(25,209)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 134

F. McGINIS AND R. E. YOUNG, PLAINTIFFS IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPERIOR COURT OF IMPERIAL COUNTY, STATE OF CALIFORNIA.

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1 In the Justice's Court of the Township of Calexico, County of Imperial, State of California.

#196.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

C. F. McGINIS and E. E. YOUNG, Defendants.

Transcript of the Case on Appeal from the Order Denying Motion for New Trial and on Appeal from the Judgment.

Be it remembered, that the above entitled action came on regularly for trial, upon the plea of not guilty heretofore entered on the 22nd day of April, 1915 by each defendant, before the above entitled Court, Hon. J. B. Hoffman, Justice of said Court presiding, on the 17th and 19th days of May, 1915, before a jury duly called, impaneled and sworn, and E. E. Leighton, Esq., Special Prosecutor, and F. R. Simon, Esq., Assistant District Attorney, appearing for the plaintiff above named, and the defendants, C. F. McGinis, and E. E. Young, being personally present in Court, and William Ses, Jr., Esq., and Leslie Read, Esq., appearing as attorneys for said defendants; and oral and documentary evidence having been submitted to said jury, and upon the completion of the taking of testimony, the attorneys appearing for both plaintiff and defendants having argued the case, and having submitted the case, and the Court having instructed the jury and having submitted the case to said jury for their consideration and deliberation, said jury on or about the 19th day of May, 1915, returned a verdict of "Guilty" against said defendants.

That on the trial of the above entitled action after said jury was sworn to try the above entitled action, the following proceedings were had and taken, to-wit:

2 Mr. Simon: May it please the Court and gentlemen of the jury. I will read to you the complaint on file herein as follows:

In the Justice's Court of — Township, County of —, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

E. E. YOUNG and C. F. McGINIS, Defendants.

Complaint—Criminal.

P. C., Secs. 806, 809, 1426.

Personally appeared before me, this 16 day of April, 1915, Roy Jones of Los Angeles, in the County of Los Angeles, State of California, who, first being sworn, complains and says: That E. E. Young and C. F. McGinis of Calexico, California on the 16th day of April, 1915, and before the filing of this Complaint, at Calexico, in the said County of Imperial, State of California, did wilfully and unlawfully have in their possession a preparation of cocaine containing more than one-sixth grain of cocaine to the fluid or avoirdupois ounce, that said E. E. Young and C. F. McGinis did not receive or obtain said cocaine upon the written order or prescription of a physician, dentist or veterinary surgeon licensed to practice in the State of California, and that the said E. E. Young and C. F. McGinis were not then and there manufacturers, jobbers or wholesalers to pharmacists, and that said defendants were not then and there retail registered pharmacists or physicians, or assistant registered pharmacists or physicians, dentists or veterinary surgeons licensed to practice in the State of California, as defined in Section 8 of an Actentitled, "An Act to regulate the sale and use of poisons in the State of California and providing a penalty for the violation thereof," approved March 5, 1907, amended and approved March 19, 1909, amended and approved April 25, 1911, amended and approved June 11, 1913.

All of which is contrary to the statute in such cases made and provided, and against the peace and dignity of the People of the State of California.

Said Complainant therefore prays that a Warrant may be issued for the arrest of the said E. E. Young and C. F. McGinis and that they may be dealt with according to law.

ROY JONES.

Subscribed and sworn to before me, this 16 day of April, 1915.

J. B. HOFFMAN,
Justice of the Peace of said Township.

(Endorsed:) Filed April 16, 1915. J. B. Hoffman, Justice of the Peace of said Township.

Mr. BEARDSLEY called as a witness for the People and sworn.

Mr. Leighton:

Q. What is your full name?
A. Roy Beardsley.
Q. What is your business?
A. Agent for Wells Fargo & Co. at Calexico.
Q. Were you in your office, on the 16th day of April?
A. Yes.
Q. Do you know Mr. McGinis and Mr. Young?
A. Yes.
Q. On the 16th day of April was there a package for the defendants in your office.
A. Yes, several packages.
Q. Was there a package or box from St. Louis, Mo.?
A. Yes, a box from St. Louis, Mo.
Q. How large was the box?
A. About two and one half feet by eighteen inches about 4 ft. long and weighed seventy-two pounds.
Q. What was the valuation of this box?
A. $960.00 was the valuation.
Q. Did you see Mr. McGinis or Mr. Young on that day?
A. Yes, I saw Mr. McGinis, I believe I saw both.
Q. What happened there?
A. He, I believe McGinnis paid the charges and left the box in the office.
Q. Were the Wells Fargo & Co. responsible to McGinis & Young, after the charges were paid and the box receipted for?
A. Wells Fargo & Co. is not responsible after the charges are paid, and so far as the express company was concerned McGinis & Young could have taken the box away at any time the box was receipted for.
Q. Have you the shipping receipt?
A. Yes. (Hands shipping receipt to Mr. Leighton.)

Mr. SEE: We have no objection to the shipping receipt.

Mr. Leighton reads as follows:

Wells Fargo & Co. Express.

Consignee: McGinis & Young.
Address: ——.
O. H. No. —. Article Bx. 960.00 Val. Date 4/12, 1915.

Clerk's No.	W. F. Co.	Date.	Billing office.	C. O. D.	Weight.	Total Col.	Paid in part.
2	40	4/7	St. Louis.	....	72	6.96	....

Name of Shipper, —— ——, Address, ——.
O. H. from Sheet, ——. Why O. H., ——.
Notice of Consignee, —— Shipper, —— ——, Billing Office, ——.
Claim Dept. ——.

How disposed of ——, —— —, 191—.
By ——. Received the above in good order 4/10, 1916.
Identified by —— ——.
(Signed) McGINNIS & YOUNG.

Mr. Leighton: What are these pencil figures on the back?
Mr. Sea: I object. The defendants are being tried only on one package.
Mr. Leighton: I want the witness to explain them.
Mr. Sea: They are no part of the shipping receipt.
Court: Objection overruled.

Q. What are these figures?
A. Amounts of charges on other packages.
Q. What do the figures represent?
A. Five different shipments shown on the back.

Mr. Sea: I have no objection to the introduction of the shipping receipt excluding the figures on the back.
Mr. Leighton: We agree to that. I ask the Court to mark this as People's Exhibit A.
Court: Marked People's Exhibit A.

(Mr. Leighton shows receipt to jurors.)

Mr. Leighton: Mr. Sea, have you any objection to this receipt being returned to the witness, as it is a part of his office records.
Mr. Sea: We have no objection.

Q. Did you see the box mailed by Mr. Jones?
A. Yes.
Q. This happened in the town of Calexico, Imperial County, State of California?
A. Yes.
Q. Can you state from your own knowledge what the port of destination of the box was?
A. No. The record of the original waybill is in the Chicago office.
Q. What was the destination to your best remembrance?
A. Mexicali, Mexico to McGinnis & Young, the consignees.
Q. After the charges were paid and the receipt returned to you, who took charge of the box?
A. Mr. McCoy, a custom broker.
Q. Did the express company turn the box over to McCoy?
A. No, McGinnis & Young did.

Cross-examination.

By Mr. Sea:

Q. Where is his office?
A. His office is with mine.
Q. Is there a distinction between the offices?

A. There is no distinction, they are in the same room.
Q. Were you present when the box was seized?
A. Yes.
Q. Where was the box?
A. In my office, it had been in the rear room.
Q. Who removed it?
A. I think Mr. McCoy did.
Q. What did he do with the box?
A. Weighed the contents.
Q. Who weighed the contents?
A. Mr. McCoy and Mr. Young weighed the contents.
Q. Where was the weighing machine?
A. In the same room.
Q. Was the weighing machine in its customary place?
A. Yes sir.
Q. Who brought the box in?
A. Either Mr. Young or Mr. McCoy brought the box in. I am not certain who it was.
Q. Do you know who weighed the contents of the box?
A. Yes.
Q. Who was it?
A. Mr. McCoy.
Q. Do you know why Mr. McCoy was weighing the box?
Mr. Leighton: Objected to as immaterial. It makes no difference if Mr. McCoy was weighing the box.
Court: Objection overruled.
Q. Do you know why Mr. McCoy was weighing the box?
A. Yes.
Mr. Leighton: Objected as not proper cross examination.
Mr. Sea: It is proper cross examination. I purpose to show, if I can, the purpose for weighing the contents of the box.
Mr. Leighton: It makes no difference.
Mr. Sea: Question withdrawn.
Q. Were you present when Mr. Jones came in?
A. Yes.
Q. Who had charge of the box?
A. Mr. McCoy.
Q. Was Mr. McGinis present?
A. No.
Q. Was Mr. Young present?
A. [illegible]

Redirect examination.

By Mr. Leighton:

Q. Has the Wells Fargo & Co. an office in Mexicali?
A. No.
Q. Did they ever have one?
A. No.

Q. Did you have several packages in the Wells Fargo office addressed to McGinis & Young?
A. I don't recall.
Q. How long have you known Mr. Young and Mr. McGinis?
A. About 4 or 5 months.
Q. In Calexico during that time?
A. Yes.
Q. Is it impossible for Wells Fargo & Co. to deliver in Mexico?

Mr. Sea: Objected to as leading.
Court: Objection overruled.

A. It is impossible to deliver to Mexico.
Q. When goods are received addressed to a consignee at Mexicali, what do you do?
A. Notify them.
Q. Notify that there are goods for them at Calexico?
A. Yes.
Q. Delivered at Calexico when called for?
A. Delivered to consignee when called for.

Mr. Sea: Objected to as leading.
Mr. Leighton: You did not object to it at the time the question was asked.
Mr. Sea: The question is leading.
Court: Overruled.

Q. When a shipment is received by Wells Fargo addressed to consignees at Mexicali to whom to you deliver it?
A. To the consignee at my office at Calexico.
Q. To whom did you make delivery of the package from St. Louis, Mo.?
A. To McGinnis & Young.

Recross-examination.

By Mr. Sea.

Q. The purpose of notifying the consignee, where shipment is made to Mexicali, is for the reason that the Wells Fargo line ends at Calexico, and you make delivery to consignee at Calexico because Wells Fargo ends in Calexico?
A. Yes.

Mr. Jones called as a witness for the People and sworn.

Direct examination.

By Mr. Leighton:

Q. What is your full name?
A. Roy Jones.
Q. What is your business?
A. Inspector for the State Board of Pharmacy of California.

Q. How are you paid your salary?
A. By the State.
Q. Do you receive emoluments other than your salary?
A. No.
Q. Where were you on the 16th day of April?
A. At Calexico.
Q. How long before the 16th day of April were you in Calexico?
A. I came on Monday the 15th, prior to that time I was here several weeks.
Q. On the 16th day of April what did you do?
A. Seized the package of the defendants.
Q. Seized at the Wells Fargo office.
A. Yes.
Q. Who was with you when you seized the package?
A. Mr. Hoag and Mr. McCoy were with me.
Q. Was Mr. Beardsley there?
A. I don't remember.
Q. Did you make inquiries about the package?
A. Yes.
Q. From whom did you make inquiries?
A. Mr. Beardsley and Mr. McCoy.
Q. What information did you get from Mr. Beardsley?
A. That this package from St. Louis, Mo., had been received and paid for by McGinnis & Young.
Q. Did you get any information as to the delivery of the package?

Mr. Sea: Objected to as hearsay and that no proper foundation has been laid.

Court: Objection sustained.

Q. Did you seize the package?
A. Yes.
Q. What did it contain when you seized it?
A. Cocaine, morphine and opium.
Q. How many packages?
A. 184 ozs. of cocaine, 115 ozs. of morphine, and one package of gum opium, weighing about two pounds.
Q. What did you do with it?
A. Placed it in the First National Bank of Calexico.
Q. What for?
A. For safe keeping.
Q. After placing it in the bank did you remove any?
A. Yes.
Q. What did you remove?
A. I removed a package of morphine, one of cocaine, and a sample of opium.
Q. How much cocaine?
A. I took out of the package an oz. bottle.
Q. What did you do with it?
A. I took the oz. bottle to Dr. Smith to be analyzed.
Q. Did he keep the bottle?
A. No. He took a sample to analyze.

Q. What condition was the package in when you took it to Dr. Smith?
A. In an unbroken package.
Q. Who broke the seal?
A. I did.
Q. Who were present when you broke the seal?
A. Mr. Hoag and Dr. Smith.
Q. In whose possession is the bottle now?
A. In my possession. (Hands an envelope to Mr. Leighton.)
Q. Who sealed the envelope and signed it?
A. Marked by Dr. Smith and sealed in my presence.

(Mr. Leighton opens envelope — takes out bottle.)

Q. Is this one of the 184 bottles in the box that was seized?
A. Yes.
Q. What was the valuation?

Mr. Sea: Objected to as immaterial.
Mr. Leighton: I think the value is material.
Mr. Sea: The value makes no difference.
Court: Objection sustained.

Q. Did you arrest the defendants on that day?
A. Yes.
Q. Where did you arrest Mr. Young?
A. In the Wells Fargo Office.
Q. How long after seizing the goods did you arrest Mr. Young?
A. About one half hour.
Q. How did you arrest Mr. McGinnis?
A. Mr. Young sent a messenger for Mr. McGinnis.
11 Q. When Mr. McGinnis came did you arrest him?
A. Yes.

Cross-examination.

By Mr. Sea:

Q. Where was the box at the time you arrested him?
A. In the Wells Fargo office on the floor.
Q. Was the weighing machine near it?
A. I did not notice.
Q. Where is Mr. McCoy's office?
A. Mr. McCoy has a joint office with Mr. Beardsley.
Q. Do you know if it was in Wells Fargo's office or in Mr. McCoy's?
A. In the rear room back of Wells Fargo desk.
Q. Where was Mr. McCoy's desk?
A. Mr. McCoy's desk is in the front.
Q. Did you see the scales?
A. Didn't see the scales.
Q. Was Mr. Young there when the box was seized?
A. No.

Q. Did you know where it was?
A. No.
Q. How long after you arrested Mr. Young did you arrest Mr. McGinnis?
A. About one half hour, as near as I can remember.
Q. Did you know where Dr. McGinis was?
A. Only by hearsay.
Q. What did you say to Mr. Young about Dr. McGinis?
A. I didn't say anything.

Mr. Leighton: I objected to conversation as hearsay.

Q. Did you tell Mr. Young what you wanted Dr. McGinis for?
A. Yes.
Q. Were you present when he sent the messenger?
A. Yes.
Q. Do you know where he sent the messenger?
A. No.
Q. Who had charge of the box when you seized it?
A. I seized it in the Wells Fargo office.
Q. And whom did you have a conversation with concerning it?
A. With Mr. Beardsley and Mr. McCoy.
Q. What was the conversation?

Mr. Leighton: Objected to on the grounds of hearsay. You can go on asking those questions but you know that it is hearsay.
Court: Objection sustained.

Q. From whom did you get your authority to take the box?
A. From myself.
Q. Who showed you where the box was?
A. Mr. McCoy showed me where the box was.
Q. What conversation did you have with Mr. McCoy?
A. I talked to Mr. McCoy and gave him my card. I asked him if he had a box of cocaine for McGinnis and Young.
Q. What did Mr. McCoy say?
A. He said take it it isn't mine.
Q. Did Mr. McCoy tell you that he had possession of the box?
A. He said Young & McGinnis were arranging with him to take the box across the line.

Dr. SMITH called as a witness for the People and sworn.

Direct examination.

By Mr. Leighton:

Q. What is your business?
A. Practicing Physician and surgeon.

Mr. See: We admit the qualifications of Dr. Smith.

Q. Did Mr. Jones take you a package of cocaine?
A. Yes.

Q. I show you an envelope which is sealed and has your signature signed on or about the 29th day of April, 1915, is that correct?
A. It was sealed in my presence and that is my signature.
Q. What did you seal in the envelope?
A. A bottle containing an oz. of cocaine from which I took a sample that is now in my possession and which has been under lock and key up to the present time.
Q. What was the sample?
A. It was cocaine. I made two chemical examinations, and two physical tests one on a dog and one on myself.

Mr. Leighton: I ask that this envelope and contents of oz. bottle of cocaine be marked People's Exhibit B.
Court: So marked.

Cross-examination.

By Mr. Sea:

Q. Is that pure cocaine?
A. That is pure cocaine, 437½ grains to an oz.
Q. It is Chemically pure?
A. Yes, it is chemically pure cocaine.
Q. Does it contain any other substances?
A. Yes, hydrochloraic acid.
Q. Does it contain any water?
A. Yes.
Q. Water crystalate?
A. Yes.

Redirect examination.

By Mr. Leighton:

Q. How much cocaine can be used by any person not accustomed to it?

Mr. Sea: Objected to as immaterial.
Mr. Leighton: It is not immaterial, I want to show the willful use.
Court: Sustained.

Q. What is the value of cocaine per oz.?
A. I do not know the value but I think about $5.00 per oz.

Mr. Sea: Objected to as immaterial.
Court: Strike it out.

Q. Dr. Smith, have you used cocaine in your practice?
A. Yes, as a local anesthesia.

Mr. Sea: Objected to as immaterial.
Court: Objection sustained.
Dr. Smith: Used as a local anesthesia by a physician the oz. bottle of cocaine contains approximately 2000 doses.

Mr. Leighton: It is stipulated by Counsel that this manifest may be introduced in evidence and marked People's Exhibit C. Reads as follows:

Invoice of Goods for Export to Mexico Shipped on Consignment Without Sale by Exporter.

Place and Date, St. Louis, Mo., 1915. Invoice of J. S. Merrill. Consigned by —— ——. Do. of St. Louis; to McGinnis & Young of Mexicali, Mex. to be shipped per Wells Fargo & Co., Express.

Marks and No. of packages.	Quantities and description of goods.	Full market value at sold for home consumption—amount.
1 Box	100 ozs. morphine sulphate.....	550.00
	100 ozs. cocaine muriate	390.00
	2 # gum opium	20.00
	⅛ oz. morphine sulphate sample.....	
		960.00

(Signature of owner or agent.)

J. S. MERRILL DRUG CO.,
Per REED, *S. C.*

Court: So marked.

Mr. McCUMBER called as a witness for the Defendants and sworn.

Direct examination.

By Mr. Sea:

Q. What is your full name?
A. O. C. McCumber.
Q. What is your official title?
A. Chief Deputy Inspector of United States Customs at the Port of Calexico.
Q. Do you know the defendants?
A. Yes.
Q. How long have you known them?
A. I have known Mr. McGinis about one year, and Mr. Young about three of four months.
Q. On or about the 18th day of April this year did the defendants have permission to export a package of cocaine to Mexicali?

Mr. Simon: Objected to as immaterial.

Mr. Sea: I purpose to show whether or not the defendants had permission to take a box across the line.

Mr. Simon: Objected to as immaterial.

Court: Objection sustained.

Q. Did you have any authority in your office to permit McGinis and Young to export a package of cocaine to Mexico?

Mr. Simon: Objected to as immaterial.
Court: Objection sustained.

Q. Mr. McCumber, did you have authority in your office from the Treasury Department of the United States giving permission to the defendants to transport a box of morphine and cocaine to Mexico?

Mr. Leighton: Objected to.
Court: Objected sustained.

Q. Mr. McCumber, did you inform these defendants, McGinis and Young that you had authority from the Treasury Department of the United States for them to export a quantity of cocaine from the United States to Mexico?

Mr. Simon: Objected to.
Court: Sustained.

Q. On or about the 16th day of April, 1915, did you have any conversation with the defendants, McGinis and Young, with reference to your having permission from the United States Treasury Department allowing them to export a quantity of cocaine from United States to Mexico?

Mr. Leighton: Objected to.
Court: Objection sustained.

Q. Mr. McCumber, did you receive from the Treasury Department of the United States or from any of its offices a telegram granting authority to McGinis and Young to export a quantity of cocaine from United States to Mexico?

Mr. Simon: Objected to.
Court: Sustained.

Q. Did the defendants, Young and McGinis, pay for any telegram that you had received relative to authority to them to export a quantity of cocaine from the United States to Mexico?

Mr. Simon: Same objection as before, it has already been ruled on.
Mr. Leighton: Assigned as error.
Court: Sustained.

Q. Have you a telegram in your possession the charges of which were paid for by McGinis and Young?

Mr. Leighton: I object, whether or not he had a telegram has no connection with this case.
Court: Sustained.

Q. Have you in your possession a telegram received by you, on or about the 16th day of April, 1915, from the Treasury Department of the United States, the charges of which were paid for by the

defendants McGinis and Young, granting the defendants authority to export a quantity of cossine from United States to Mexico?

Mr. Leighton: Objected to.

Court: Sustained.

Q. Mr. McCumber, have you in your possession a telegram received by you at your office in Calexico from the United States Treasury Department, the charges of which were paid by the defendants, McGinis and Young?

Mr. Leighton: We are willing to let him answer the question.

A. No.

Q. Have you in your possession a copy of a telegram received by you on or about the 16th day of April, 1915, relative to the granting of permission to the defendants to export a quantity of cossine from the United States to Mexico?

Mr. Leighton: Objected to on the ground it is immaterial. I thought when I let him answer one that that would end it.

Court: Objection sustained. Proceed.

Q. Mr. McCumber, have you in your possession a copy of a telegram, the charges of which were paid by the defendants, McGinis and Young, to you and which original telegram was received by the Collector of customs at Los Angeles from the Treasury Department of the United States, and which said charges were forwarded by you after being paid by the defendants, to the Collector of Customs at Los Angeles, which said copy granted permission to export cossine from the United States to Mexico?

Mr. Leighton: Objected to as irrelevant and unfair.

Court: Objection sustained.

Q. Have you a copy of a telegram in your possession, the charges for the original telegram, of which this is a copy, were paid for by McGinis and Young?

Mr. Leighton: Mr. Sec is assuming by the question that a telegram was received.

Mr. Sec: You have already objected to the form of the question where it was asked as a fact and I purpose to show that the telegram was received by the Collector of Customs at Los Angeles and that McCumber has a copy.

Mr. Leighton: Objected to as being unfair to jurors.

Court: Objection sustained.

Q. Have you in your possession what purports to be a copy of a telegram purported to have been received by the Collector of Customs at Los Angeles, purported to have been sent by the Treasury Department of the United States on or about the 16th day of April, 1915, a copy of which was forwarded from Los Angeles to your office at Calexico of which the charges were paid by the defendants on or about the 16th day of April, 1915.

Mr. Leighton: Objected to as leading and immaterial.
Mr. Sen: I stated absolute facts before you and you objected.
Mr. Leighton: This is along the same line as the other questions.
Court: Objection sustained.

Q. If any quantity of cocaine had been consigned to the defendants, McGinis and Young, at Mexicali, would you have permitted it to cross the line?

Mr. Leighton Objected to as immaterial.
Court: Objection sustained.

Q. Mr. McCumber, did you know that there was a shipment of goods, a part of which was cocaine, from United States and consigned to McGinis and Young at Mexicali, on or about the 16th day of April, 1915?

Mr. Leighton: Same objection as before.
Court: Objection sustained.

Q. Did you have any conversation with the defendants relative to a consignment of cocaine to be exported to Mexico?

Mr. Sirson: Objected to.
Mr. Leighton: Assigned as error.
Court: Objection sustained.

Q. On or about the first day of April this year did you write out in pencil and hand to the defendants, McGinis and Young, what purported to be a request to the Treasury Department of the United States to have a consignment of cocaine and morphine shipped from the United States to Mexico?

Mr. Leighton: Objected to as immaterial. The question does not show that he knows what letter is referred to or what it contained.
Court: Sustained.

Q. Mr. McCumber, on or about the first day of April this year did you write out in pencil a letter from the defendants asking permission from the Treasury Department of the United States to receive a consignment of cocaine in Mexico from the United States?

Mr. Leighton: Objected to as immaterial.
Court: Sustained.

Q. On or about the first day of April this year at the time you wrote that letter which I have mentioned in my last question, did you show the defendants the Treasury decisions relating to the exportation of cocaine and morphine from the United States to Mexico?

Mr. Leighton: Objected to as incompetent.
Court: Sustained.
Mr. Leighton: No cross examination.

Mr. McCoy called as a witness for the Defendants and sworn.

Direct examination.

By Mr. Sea:

Q. What is your full name?
A. W. I. McCoy.
Q. What is your business?
A. Custom Broker.
Q. As a custom broker what are your duties?

Mr. Leighton: Objected to as immaterial.
Court: Sustained.

Q. Do you hold yourself out to the public as a common carrier of goods?

Mr. Leighton: Objected to.
Mr. Sea: I withdraw the question.

Q. Do you hold yourself out to the public as a transporter of goods to Mexico?
A. Yes.

Mr. Leighton: It is not material what the defendants intended to do with the goods in Wells Fargo office.
Mr. Sea: I intended to show that the defendants were having the goods exported across the line.
Mr. Leighton: Keep on this side of the line.

Q. Mr. McCoy, were you in your office at the time Mr. Jones seized the box?
A. Yes.
Q. Where was the box located at the time of seizure?
A. At the partition between *from* and back.
Q. Where were the scales?
A. About the center of the office.
Q. How far from box?
A. About ten feet, I think.
Q. At time of seizure of the box and contents by Mr. Jones who had possession?

Mr. Leighton: It is a question of law and unfair.
Court: Sustained.

Q. Who had control of box at time of seizure by Mr. Jones?
A. I did after Wells Fargo turned it over to me at my office and I had made out bills.
Q. Were Young and McGinis present.
A. No.
Q. Did you have custody of the box?
A. As their agent.
Q. Was defendant McGinis in your office prior to seizure?
A. No.
Q. Had you made out bills?

Mr. Leighton: Objected to.
Mr. Sea: I withdraw the question.

Q. What papers did you make out that you have testified to?

21 Mr. Leighton: Objected to.
Court: Objection sustained.

Q. Did you just prior to seizure of box unpack the contents?
A. Yes, one half hour before.
Q. Did you weigh the contents?
A. Yes.
Q. What was the purpose of weighing?

Mr. Leighton: Objected to as immaterial.
Court: Objection sustained.

Cross-examination.

By Mr. Leighton:

Q. Mr. McCoy, who turned the package over to you?
A. Mr. Young, the defendant.

Mr. Sea: Objected to as not proper cross examination. I did not touch on that in direct examination.
Court: Objection sustained.

Q. Do you know whether McGinis and Young are partners?

Mr. Sea: Objected to as not proper cross examination.
Court: Objection sustained.

Q. Did you testify that you had custody of the box for McGinis and Young?
A. Yes.
Q. Who was it consigned to?
A. Consigned to McGinis and Young.
Q. Are the defendants partners?

Mr. Sea: Objected to as not proper cross examination.
Court: You may answer.

Q. Do you know if they are partners or not?
A. They are doing business as partners, I think.
Q. Was the package turned over to you by McGinis and Young?
A. Mr. Young turned the package over to me.
Q. At the time Mr. Young turned it over to you what did you do with the package?
22 A. I unpacked it.
Q. How many bottles of cocaine in it?

Mr. Sea: I object on the ground that it is not proper cross examination.
Court: Overruled.

Q. How many bottles of cocaine in the package?

A. 185 bottles of cocaine, 115 of morphine, one package of opium.
Q. How many bottles in the box besides what came from St. Louis Mo.

Mr. Sea: I object on the ground that there was no evidence that he had added to it.
Court: Objection overruled.

A. Three or four other packages were put into the box when repacked.
Q. How many oz. of cocaine in original box from St. Louis?
A. 100 oz. in the original package from St. Louis.
Q. How many when repacked?
A 185 ozs. of cocaine when repacked.
Q. Were the other packages turned over to you by Mr. Young?
A. Yes.
Q. Who did you help unpack the box?

Mr. Sea: I object on the ground that there was no evidence that he had helped anyone.
Court: Sustained.

Q. Who unpacked the box?
A. Mr. Young and myself.
Q. During the time, that the box was there, if McGinis and Young had said that it was their box could they have gotten it from you?

Mr. Sea: Objected to on the same ground and as leading.
Court: Sustained.

Q. Whose box was it while in your possession?

Mr. Sea: Objected to on the same ground.
Court: Sustained.

22 Q. To whom was it billed?
A. To McGinis and Young, Mexicali, Mexico.
Q. From whom did you get it?
A. I got it from Mr. Young.
Q. Were you acting as agent for McGinis and Young?
A. Yes.
Q. When in your office was the box subject to their control?
A. Yes.
Q. Could they remove it from your office.
A. Yes. I was acting as agent for McGinis and Young.

Redirect examination.

By Mr. Sea:

Q. Did you repack the box?
A. Yes.
Q. What was the purpose of repacking?

Mr. Leighton: Objected to as immaterial and not a proper question.

Mr. Sea: It is a proper question to show that it was to be taken by McCoy from the United States to Mexico.

Mr. Leighton: It is only a question of possession in this case. You are trying to ascertain the state of mind of the witness.

Court: Objection sustained.

Q. What was the fact of your adding something else to the original contents of the box?

Mr. Leighton: Objected to.

Court: Sustained.

Q. Did you testify in reply to counsel that you made out papers for this box as repacked?

Mr. Leighton: Objected to as immaterial and improper and assigned as error.

Court: Objection sustained.

Q. Did you testify in answer to a question by Counsel for the People that you made out papers for the box that you had repacked?

Mr. Leighton: It is immaterial.

24 Mr. Sea: Counsel drew this out himself on cross examination.

Court: Sustained.

That thereafter, after arguments by the attorneys for both parties, the Court gave certain instructions to the jury, Counsel for both parties having waived the reading of the same and the Court, having refused to give certain instructions requested by the defendants, which said refused instructions and the instructions given as requested by the People are hereinafter set forth and assigned as error, submitted the case to the jury for their consideration and deliberation.

That thereafter and during the deliberations of the jury, said jury requested of said Court further instructions as to the definition of a common carrier and as to the definition of a custom house broker, which said requested instructions as to said definitions are hereinafter set out. Thereupon the attorneys for both parties stipulated and agreed that the Court should give to the jury and instruction as to the definition of a customhouse broker based upon the United States Treasury Decisions as to the definition of a customhouse broker, to which said stipulation and agreement of the attorneys for both parties said Court agreed. That immediately thereafter, and upon the production of the United States Treasury Decisions as to the definition of a customhouse broker, said Court informed said jury as follows: "I will not give you any further instructions. These instructions that I have already given you govern the case." That said instructions so requested by said jury are hereinafter set out and the refusal by the Court to give said further instructions is hereinafter assigned as error.

That thereafter and on or about the 19th day of May, 1915, said jury returned a verdict as follows, to-wit:

In the Justice's Court of Calexico Township, County of Imperial, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs,

vs.

E. E. YOUNG, C. F. McGRAW, Defendants.

We, the jury, in the above entitled action find the defendants Guilty as charged.

L. J. IVEY, *Foreman.*

Court filed verdict and after defendants' attorneys gave notice of motion for a new trial on all statutory grounds, the court continued to May 20, 1915, 10 A. M., for sentence.

That thereupon the attorneys for said defendants made a motion for a new trial based upon the notice of motion for a new trial filed herein, which said notice of motion for a new trial is as follows, to-wit:

(Title of Court and Cause.)

Notice of Motion for New Trial.

To the above entitled Court and to Hon. J. B. Hoffman, Justice of said Court, and to E. E. Leighton, Esq., Special Prosecutor, and to E. R. Simon, Esq., Assistant District Attorney:

You and each — you will please take notice that the above named defendants and each of them will on the 20th day of May, 1915, move the above entitled Court, Hon. J. B. Hoffman, Justice of said Court presiding, for a new trial in the above entitled action.

Said motion will be made upon all the orders, records, pro-
20 ceedings and files in the above entitled action, and upon this notice, and will be based upon the following grounds, to-wit:

1. Errors in the decisions of the Court given on questions of law arising during the course of the trial;

2. That the verdict is contrary to law;

3. That the verdict is contrary to the evidence.

4. Newly discovered evidence material to the defendants and to each of them which they or either of them could not, with reasonable diligence, have discovered and produced at the trial.

And you are further notified that upon the hearing of said motion said defendants and each of them will rely upon the following specifications, to-wit:

Specifications of Ground No. 1.

a. That the Court erred in giving the following instructions requested by the plaintiff and numbered as follows, to-wit:

"1. The state, has the police power of regulating the sale and use

of cocaine and other poisons, and has limited the possession of cocaine to certain classes of persons who are intrusted with the possession for sale and use by legitimate purposes."

"3. It is not incumbent upon the State to prove that the defendant is not a physician, pharmacist, dentist or veterinary surgeon, or that he did not obtain the cocaine upon the written order or prescription of a physician, dentist or veterinary surgeon or any other exception which is negative in the complaint. These facts are presumed to be peculiarly within the knowledge of the defendant and if he wishes to place himself within one of these exceptions, it is incumbent upon him to furnish satisfactory proof to you that he does not come within one of these exceptions which are negative in the complaint, such as being a physician, dentist or veterinary surgeon."

"4. The wholesaler to pharmacists is one who wholesales drugs to pharmacists, registered to practice in the State of California, and is obliged to keep a register of all sales of cocaine under Sec. 8 of the poison Act, so called. A physician, dentist or veterinary surgeon in this State in order to be regarded as such must be duly licensed to practice in the State of California, according to law."

"6. When goods come to rest in the State of California when they have been shipped from another state they are immediately incorporated as state property and subject to state laws, though still in the original package."

"7. If Wells Fargo Co. had received these goods from a party in St. Louis who had the right to have them in his possession, to be delivered by them to the consignee at Mexicali, Mexico, the
27 — having the same in possession at Calexico by the consignee, the defendants would be in violation of Sec. 8 of the Poison Act; provided, it is also found that McGinis and Young, the defendants are not registered pharmacists, or physicians, dentists or veterinary surgeons, or wholesalers to pharmacists in the State of California."

"8. If a shipment of cocaine which is shipped from St. Louis by an Express Company to be delivered by the Express Company to the consignee in Mexico, and the shipment is received and receipted for in California, the shipment to a foreign country is then ended, the goods having been delivered to the consignee, and the consignee is amenable to the State laws regulating the sale and use of poisons in relation to said cocaine."

"9. Manual possession or possession in hand is not necessary to prove that the defendants had cocaine in possession. Possession means dominion and control, and if you find from all the evidence beyond a reasonable doubt that the defendants had within their dominion and control cocaine, in the manner and form as al-edged in the complaint, you must find them guilty even though they did not have it in their actual manual control."

"10. You are further instructed that if you believe from the evidence beyond a reasonable doubt, that the defendants, or either of the defendants acting for himself and his codefendant, paid the express charges on, and receipted to the Express Company for the cocaine which the defendants are charged with unlawfully having in

their possession in this action, and that the control of the Express Company over said cocaine has ceased, then said cocaine would be legally in the possession of the defendants."

"1. And if you further believe, from the evidence, beyond a reasonable doubt, that, after receipting for said cocaine to the Express Company and paying the charges thereon, the defendants employed one, W. I. McCoy, to transport said cocaine to any place whatever, then W. I. McCoy would be the agent of the defendants, and McCoy would only have the custody of said cocaine and the defendants would still have the dominion and control over said cocaine, and said cocaine would be legally in the possession of the defendants."

"12. If you believe, beyond a reasonable doubt, from the evidence, that the defendants had in their possession in the County of Imperial and State of California certain cocaine, as charged in the complaint herein, and that said possession was unlawful under the laws of the State of California, then you are instructed that the fact that the defendants may have intended to export said cocaine to a foreign country, if it be a fact, would be no defense in this action."

"13. You are further instructed that there are no laws of the federal government which would protect the defendants from prosecution by this State, for having cocaine unlawfully in their possession under the laws of this State."

"14. By reasonable doubt is not meant that the People must prove the defendant guilty beyond a possible doubt or that demonstration of the defendants' guilt must be made, for nearly all matters in human affairs are open to possible doubt and demonstration is rarely possible."

23 *b.* That the giving of said instructions above set out was error and said instructions and each of them affected the substantial rights of the defendants and each of said defendants;

c. That the Court erred in refusing to give the following instructions requested by the defendants and numbered as follows, to-wit:

"VII. You are instructed that you must give just as much weight to the laws and regulations of the United States as to the laws of the State of California, and that where the State law conflicts with the laws and regulations of the United States upon the same subject, the laws and regulations of the United States control."

"VIII. You are instructed that if you find from the evidence that the defendants had control of the cocaine, but the evidence shows that the cocaine was in transit, or being transported from the United States to Mexico through a chain of common carriers, then the defendants did not have possession of the cocaine in violation of the laws of the State of California, and it is your duty to acquit them."

"IX. You are instructed that if you find from the evidence that the cocaine was in transit, being transported from the United States to Mexico through a chain of common carriers, then it is not necessary for the defendants to prove that they are either of them registered physican, dentist, pharmacists or veterinary surgeon practicing in the State, or that the cocaine procured upon the order of a registered physician, dentist, pharmacists or veterinary surgeon."

"X. You are instructed that if you find from the evidence that the

cocaine was in transit or being transported from the United States to Mexico through a system of common carriers, then it is the law of this case that any transportation of passengers or merchandise through a state from one state to another or from the United States to a foreign country is within the exclusive jurisdiction of and legislation by congress or by the Treasury Department of the United States."

"XI. You are instructed that if you find from the evidence that this cocaine was being transported from the United States to Mexico, then it is the law of this case that the power of Congress to control commerce between the several states and between the United States and a foreign country cannot be restricted by the laws of or the authorities of any state."

"XII. You are instructed that the charge brought against the defendants in this case is, under a Section of the laws of this State, and is exercised as the police power of the State, and that it is the law of this case, as far as the police power of the State of California is concerned, that the commerce between the states or between the United States and a foreign country has been confined exclusively to Congress by the constitution of the United States, or to the decisions of the Treasury Department of the United States, and such commerce or transportation of merchandise is not within the jurisdiction of any state unless placed there by Congressional action."

"XIII. You are instructed that it is the law of this case that the independence of the commercial power of the United States
20 exercised through the Congress of the United States or through the decisions of the Treasury Department of the United States and the police power, and the delimitations between them must be always recognized and observed."

d. That the refusal by said Court to give said instructions above set out and each of them was error and the refusal to give said instructions and each of them affected the substantial rights of the defendants and of each of said defendants;

e. That the Court erred in refusing to give to the jury certain instructions requested by said jury and which said instructions so requested are as follows, to-wit.

1. "We desire that the Court instruct us as to the definition of a common carrier."

2. "We desire that the Court instruct as to the definition of a customhouse broker."

f. That the refusal of said Court to give said further instructions as so requested by said jury was error and said refusal to give and to comply with said request to give said definitions above mentioned and each of them affected the substantial rights of the defendants and of each of them.

g. 1. That the Court erred in overruling the objection to the following question by Mr. Leighton, "What are these pencil figures on the back," over the objection by Mr. Sea, "That they are trying them on one package." "They are not part of the shipping receipt."

2. That the Court erred on the cross examination of Mr. Jones

in sustaining the objection by Mr. Leighton as follows: "Objected to on the ground of hearsay. You can go on asking these questions, but you know that it is hearsay.", to the question by Mr. Sea as follows, "What was the conversation?"

3. That the Court erred in sustaining the objection by Mr. Simon as follows: "Objected to as immaterial." on the direct examination of O. C. McCumber, called as a witness for the defendants and sworn, to the question by Mr. Sea as follows: "On or about the 16th day of April of this year did the defendants have permission to
30 export a package of cocaine to Mexicali?"

4. That the Court erred in sustaining the objection by Mr. Simon as follows: "Objected to as immaterial," to the question by Mr. Sea as follows: "Did you have any authority in your office to permit McGinis and Young to export a package of cocaine to Mexico?"

5. That the Court erred in sustaining the objection by Mr. Leighton as follows: "Objected.", to the question by Mr. Sea as follows: "Mr. McCumber, did you have authority in your office from the Treasury Department of the United States giving permission to the defendants to transport a box of morphine and cocaine to Mexicali?"

6. That the Court erred in sustaining the objection by Mr. Simon as follows: "Objected to," to the question by Mr. Sea: "Mr. McCumber, did you inform the defendants, McGinis and Young, that you had authority from the Treasury Department of the United States for them to export a quantity of cocaine from the United States to Mexico?"

7. That the Court erred in sustaining the objection by Mr. Leighton as follows: "Objected to.", to the question: "On or about the 16th day of April, 1915, did you have any conversation with the defendants, McGinis and Young, with reference to your having permission from the Treasury Department of the United States allowing them to export a quantity of cocaine from the United States to Mexico?"

8. That the Court erred in sustaining the objection by Mr. Simon as follows: "Objected to.", to the following question: Mr. McCumber, did you receive from the Treasury Department of the United States or from any of its officers a telegram granting authority to McGinis and Young to export a quantity of cocaine from the United States to Mexico?"

9. That the Court erred in sustaining the objection by Mr.
31 Simon as follows: "Same objection as before, it has already been ruled on.", to the following question: "Did the defendants, McGinis and Young, pay for any telegram that you had received relative to authority to them to export a quantity of cocaine from the United States to Mexico?"

10. That the Court erred in sustaining the objection by Mr. Leighton as follows:—"Whether or not you had a telegram has no connection with the case.", to the following question:—"Have you a telegram in your possession the charges of which were paid by McGinis and Young?"

11. That the Court erred in sustaining the objection by Mr. Leighton as follows:—"Objected to," to the following question:—"Have you in your possession a telegram received by you on or about

the 19th day of April, 1915 from the Treasury Department of the United States, the charges of which were paid by the defendants McGinis and Young, granting the defendants authority to export a quantity of cocaine from the United States to Mexico?"

12. That the Court erred in sustaining the objection by Mr. Leighton as follows:—"Objected to on the ground of it being immaterial.", to the following question:—Have you in your possession a copy of a telegram received by you on or about the 16th day of April, 1915, relative to the granting of permission to the defendants to export a quantity of cocaine from the United States to Mexico?"

13. That the Court erred in sustaining the objection of Mr. Leighton as follows:—"Objected to as irrelevant and unfair.", to the following question:—"Have you in your possession a copy of a telegram, the charges of which were paid by the defendants, McGinis and Young, to you and which original telegram was received by the Collector of Customs at Los Angeles from the Treasury Department of the United States, and which said charges were forwarded
32 by you, after being paid by the defendants, to the Collector of Customs at Los Angeles, which said copy granted permission to export cocaine from the United States to Mexico?"

14. That the Court erred in sustaining the objection by Mr. Leighton as follows:—"Mr. Sea is assuming by the question that a telegram was received by the collector of Customs at Los Angeles." to the following question:—"Have you a copy of a telegram in your possession, the charges for the original telegram of which this is a copy, were paid for by McGinis and Young?", and the further objection by Mr. Leighton as follows:—"Objected to as being unfair to the jurors.", to the following statement by Mr. Sea:—"You have already objected to the form of the questions where it was stated as a fact, and I purpose to show that the telegram was received by the Collector of Customs at Los Angeles, and that Mr. McCumber has a copy."

15. That the Court erred in sustaining the objection by Mr. Leighton as follows:—"Objected to as leading and immaterial." to the following question:—"Have you in your possession what purports to be a copy of a telegram purported to have been received by the Collector of Customs at Los Angeles, purported to have been sent by the Treasury Department of the United States on or about the 16th day of April, 1915, a copy of which was forwarded from Los Angeles to your office at Calexico, the charges of which were paid by the defendants on or about the 16th day of April?", and the further objection by Mr. Leighton as follows:—"This is along the same lines as the other question." made to the statement by Mr. Sea as follows:—"I stated absolute facts before and you objected."

16. That the Court erred in sustaining the objection by Mr. Leighton as follows: "Objected to as Immaterial." to the following question: "If any quantity of cocaine had been consigned to the defendants, McGinis and Young, at Mexicali, would you have permitted it to have crossed the line?"

17. That the Court — in sustaining the objection of Mr. Leighton as follows:—"Same objection as before." to the following question:—"Mr. McCumber, did you know that there was a shipment of goods a part of which was cocaine from the United States and consigned to McGinis and Young at Mexicali, on or about the 16th day of April, 1915?"

18. That the Court erred in sustaining the objection by Mr. Simon as follows:—"Objected to." and the statement by Mr. Leighton as follows:—"Assigned as error.", to the following question:—"Did you have any conversation with the defendants relative to a consignment of cocaine to be exported to Mexico?"

19. That the Court — in sustaining the objection by Mr. Leighton as follows:—"Objected to as immaterial. That the question does not show that he knows what letter is referred to or what it contains." to the following question:—"On or about the first day of April, this year, did you write out in pencil and hand to the defendants, McGinis and Young, what purported to be a request to the Treasury Department to have a consignment of cocaine and morphine shipped from the United States to Mexico?"

20. That the Court erred in sustaining the objection by Mr. Leighton as follows: "Objected to as immaterial." to the following question:—"Mr. McCumber, on or about the first day of April, did you write out in pencil a letter for the defendants asking permission from the Treasury Department of the United States to receive a consignment in Mexico from the United States?"

21. That the Court erred in sustained the objection by Mr. Leighton as follows:—"Objected to as incompetent." to the following question:—"On or about the first day of April this year at the time you wrote that letter, which I have mentioned in my last question, did you show the defendants the Treasury decisions relating to the exportation of cocaine and morphine from the United States to Mexico?"

22. That the Court erred in sustaining the objection by Mr. Leighton as follows:—"Objected to as immaterial," to the following question:—"As a custom broker what are your duties?" on direct examination of W. I. McCoy, called as a witness for the defendants.

23. That the Court erred in sustaining the objection by Mr. Leighton as follows:—"It is a question of law and unfair." to the following question:—"At the time of seizure of the box and contents by Mr. Jones, who had possession?"

24. That the Court erred in sustaining the objection by Mr. Leighton as follows:—"Objected to." to the following question:—"What papers did you make out that you have testified to?"

25. That the Court erred in sustaining the objection by Mr. Leighton as follows:—"Objected to as immaterial." to the following question:—"What was the purpose of weighing?"

26. That the Court erred in overruling the objection by Mr. Sea as follows: "Objected to as not proper cross examination." to the following question by Mr. Leighton:—"Are the defendants partners?"

27. That the Court erred in overruling the objection by Mr. Sea as follows:—"I object on the grounds that it is not proper cross examination.", to the following question:—"How many bottles of cocaine in it?"

28. That the Court erred in overruling the objection by Mr. Sea, as follows:—"I object on the grounds that there was no evidence that he had added to it.", to the following question:—"How many bottles in the box besides what came from St. Louis, Mo"?

29. That the Court erred in sustaining the objection by Mr. Leighton as follows:—"Objected to as immaterial, and not a proper question.", and the further objection by Mr. Leighton as follows:—"Objection to.", to the following question by Mr. Sea:—"What was the purpose of repacking?"

30. That the Court erred in sustaining the objection by Mr. Leighton as follows:—"Objected to as immaterial and improper, and assigned as error.", to the following question by Mr. Sea:—"Did you testify in reply to Counsel that you made out papers for this box as repacked?"

31. That the Court erred in sustaining the objection by Mr. Leighton as follows:—"It is immaterial." to the following question:—"Did you testify in answer to a question by Counsel for the People that you made out papers for the box that you had repacked?"

Specifications for Ground No. 2.

Same as set forth in specifications No. *a*, *b*, *c*, *d*, *e*, *f*, and *g*, contained in Specifications under Ground No. 1.

Specifications of Ground No. 3.

a. That the evidence showed that the defendants or either of them did not willfully and unlawfully have possession of the cocaine charged in the complaint on file herein on the 16th day of April, 1915 or at any other time or at all, which said evidence is set forth in a transcript of the proceedings at said trial hereto attached and made a part hereof and more particularly referred to as to the contents thereof;

b. That the evidence showed the cocaine mentioned in said complaint was in transit from St. Louis, Mo. United States of America, to Mexicali, Republic of Mexico, in interstate and foreign commerce under the laws of the United States and the regulations of the Treasury Department of the United States, which said evidence is set forth in a transcript of the proceedings at said trial hereto attached and made a part hereof and more particularly referred to as to the contents thereof;

c. That the evidence showed that said cocaine was in transit from St. Louis, Mo. to Mexicali, Mexico, by means of common carriers
36 and by such means was in transit in interstate and foreign commerce between the United States and Mexico, which said evidence is set forth in a transcript of the proceedings at said trial

hereto attached and made a part hereof and more particularly referred to as to the contents thereof;

d. That the evidence showed that the cocaine mentioned in said complaint was part of a shipment from St. Louis, Mo., to Mexicali, Mexico consigned to the defendants at Mexicali, Mexico and was in transit in interstate and foreign commerce from the United States to Mexico and under the laws of the United States and the regulations of the Treasury Department of the United States;

e. That the evidence showed, that at the time of the seizure of said cocaine, that said cocaine was in the hands of a common carrier in transit from St. Louis, Mo., to Mexicali, Mexico in interstate and foreign commerce from the United States to Mexico and under the laws of the United States and the regulations of the Treasury Department of the United States, which said evidence is set forth in a transcript of the proceedings of said trial hereto attached and made a part hereof and more particularly referred to as to the contents thereof.

Specifications of Ground No. 4.

Newly discovered evidence material to the defendants and to each of them which they or either of them could not, with reasonable diligence, have discovered and produced at the trial, which said evidence is set forth and contained in those certain affidavits of C. F. McGinis, E. E. Young and D. B. Potts, hereto attached and made a part hereof and more particularly referred to as if incorporated herein.

Dated May 20th, 1915.

WILLIAM SEA, Jr.,
LESLIE REED,
Attorneys for said Defendants.

(Title of Court and Cause.)

#196.

STATE OF CALIFORNIA,
County of Imperial, ss:

C. F. McGinis and E. E. Young, being first duly sworn, each for himself and not one for the other, deposes and says: That he is one of the defendants in the above entitled action; that there are certain letters and communications in the office of O. C. McCumber, Chief Deputy Inspector of United States Customs, at the Port of Calexico, which said letters and communications said affiant could not, with reasonable diligence, have discovered and produced at the trial of the above entitled action; that said letters and communications set forth that permission was granted affiant to export from the United States to Mexicali, Mexico Two Hundred and Fifty (250) Ounces of cocaine; that said cocaine mentioned in the complaint and filed herein was being exported from St. Louis, Mo., to Mexicali, Mexico under said permission herein above mentioned; that said permission is shown by said letters and said communications to have been given by

the Treasury Department of the United States; that affiant learned shortly before the trial of the above entitled action that he could not produce said letters and said communications on the trial of the above entitled action without first receiving the consent of the Chief Inspector of the United States Customs at Los Angeles, California; that affiant could not, with reasonable diligence, have obtained said consent of said Chief Inspector before the trial of the above entitled action in time to have produced upon the trial of the above entitled action said letters and communications; that the evidence contained in said letters and communications is necessary and material to said affiant on the trial of the charge set forth in the complaint on file herein; that affiant verily believes that he cannot safely go to trial on said charge without said evidence.

C. F. McGINIS.
E. E. YOUNG.

Subscribed and sworn to before me, this 20th day of May, 1915.

[SEAL.] H. H. GRISWOLD,
Notary Public in and for the County of Imperial, State of California.

(Title of Court and Cause.)

#196.

STATE OF CALIFORNIA,
County of California, ss:

C. F. McGinis and E. E. Young, being first duly sworn, each for himself and not one for the other, deposes and says: That he is one of the defendants in the above entitled action; that he learned for the first time on the 19th day of May, 1915, from D. B. Potts that said Potts was in the possession of certain evidence material to said defendants and to each of them which they or either of them could not, with reasonable diligence, have discovered and produced at the trial of the above entitled action; that said evidence is set forth in the affidavit of D. B. Potts hereto attached and made a part hereof and more particularly referred to as to what said evidence is; that said Potts, if a new trial is granted herein, will be a witness for said defendants on such a trial and will give upon such trial the evidence set forth in the affidavit of said Potts; that affiant has used all necessary and reasonable diligence to ascertain and discover the evidence so set forth in the affidavit of said Potts, and affiant has been unable to so ascertain and discover said evidence with reasonable diligence until said 19th day of May, 1915.

That affiant verily believes that he cannot — a fair and impartial — without the production upon such trial of said evidence.

C. F. McGINIS.
E. E. YOUNG.

Subscribed and sworn to before me, this 19th day of May, 1915.

[SEAL.] H. H. GRISWOLD,
Notary Public in and for the County of Imperial, State of California.

(Title of Court and Cause.)

#196.

STATE OF CALIFORNIA,
County of Imperial, ss.

D. B. Potts, being first duly sworn, deposes and says: That he is a citizen of the United States and of the State of California, over the age of twenty-one (21) years and a resident of the City of Calexico, County of Imperial, State of California; that on the 16th day of April, 1915, affiant was requested by one Roy Jones, an Inspector of the State Board of Pharmacy of California, to accompany the said Jones over to that certain building located on Second Street in said City of Calexico and occupied by Wells Fargo & Co. and W. I. McCoy, a customhouse broker; that affiant did so accompany said Jones to said building, and on entering said building as so occupied, said Jones showed affiant a certain box which said Jones stated to affiant he had seized and at said time said Jones stated to said affiant that he had seized the contents of said box; that said Jones stated to said affiant that said contents of said box consisted of morphine, cocaine and opium; that at said time affiant observed the top of said box and upon such observation affiant saw the following painted on said top: "McGinnis & Young c/o W. I. McCoy, Custom Broker, Mexicali, Mexico via Calexico."

D. B. POTTS.

Subscribed and sworn to before me, this 19th day of May, 1915.

[SEAL.] H. H. GRISWOLD,
Notary Public in and for the County of Imperial, State of California.

Received a copy of the within this 20th day of May, 1915.

E. R. SIMON,
Asst. Dist. Atty.
E. E. LEIGHTON,
Special Prosecutor.

(Endorsed:) Filed this 20th day of May, 1915. J. B. Hoffman, I. P.

That thereafter and on said 20th day of May, 1915, after arguments of said motion for a new trial by the attorneys for the respective parties, said Court denied said motion.

That the order denying said motion is in words and figures follow-

ing, to-wit: "Said motion for new trial was then overruled, after due argument on the same."

That thereupon said Court passed judgment upon said defendants, which said judgment is in the words and figures following, to-wit: "And it was ordered, and adjudged that said C. G. McGinis and the said E. E. Young, defendants, each pay a fine of Three Hundred Dollars and that each of said defendants be imprisoned in the County Jail in and for the said County of Imperial, State of California, for the term of sixty days and that each of said jail sentences be suspended pending good behavior of said defendants receiving such sentence and upon the payment of the fine to be paid by each defendant, and until the fine be paid by the defendants to which such fine is assessed that he be imprisoned in said County jail for a term at the rate of
41 one day for each one dollar of fine, not exceeding in all one hundred eighty days for each defendant."

Thereupon notice of appeal was made and filed as follows:
(Title of Court and Cause.)

#196.

Notice of Appeal from Order Denying Motion for New Trial and from Judgment.

To the above entitled Court and to Hon. J. B. Hoffman, Justice of said Court, and to E. E. Leighton, Esq., Special Prosecutor, and to E. R. Simon, Esq., Assistant District Attorney:

You and each — you will please take notice that the defendants above named and each of them hereby appeal to the Superior Court of the County of Imperial, State of California, from that certain order made and entered by the above entitled Court on the 20th day of May, 1915 denying the defendants' motion for a new trial in the above entitled action.

And you will further take notice that the above named defendants and each of them hereby appeal to the Superior Court of the County of Imperial, State of California, from that certain judgment rendered, made and entered, on the 20th day of May, 1915 by the above entitled Court, which said judgment imposed a fine of Three Hundred ($300.00) Dollars upon each defendant, and which said judgment sentenced each of said defendants to sixty (60) days in the County jail of said County and which said judgment further provided that sentence of sixty (60) days be suspended during the good behavior of said defendants and the payment of the fine.

And you will further take notice that said appeal from said judgment is from the whole of said judgment on both questions of law and fact.

And you will further take notice that said appeals and each of them are taken upon the transcript of the case to be filed herein.

Dated May 20th, 1915.

WILLIAM SEA, JR.,
LESLIE REED,
Attorney for said Defendants.

42 Received a copy of the above this 20th day of May, 1915.
E. R. SIMON,
Asst. Dist. Attorney.
E. E. LEIGHTON,
Special Prosecutor.

(Endorsed:) Filed this 20th day of May, 1915. J. B. Hoffman, J. P.

That said defendants and each of them on this appeal from said order and on this appeal from said judgment rely upon and hereby specify the grounds upon which they and each of them rely as follows to-wit:

1. Errors in the decision of the Court given on questions of law arising during the course of the trial;
2. That the verdict is contrary to law;
3. That the verdict is contrary to the evidence;
4. Newly discovered evidence material to the defendants and to each of them which they or either of them could not, with reasonable diligence, have discovered and produced at the trial.

And said defendants and each of them on said appeals hereby rely upon the specifications of ground No. 1 as hereinbefore set out and commencing on line 11 of page 24 and to and including line 10 of page 33 of this transcript, as if specially set out and incorporated herein and to which reference is hereby made as to the contents thereof.

And said defendants and each of them on said appeals hereby rely upon the specifications of ground No. 2 as hereinbefore set out and commencing on line 11 of page 33 and to and including line 13 of page 33 of this transcript, as if specially set out and incorporated herein and to which reference is hereby made as to the contents thereof.

And said defendants and each of them on said appeals hereby rely upon the specifications of ground No. 3 as hereinbefore set out and commencing on line 15 of page 33 and to and including line 20 of page 34 of this transcript, as if specially set out and incorporated herein and to which reference is hereby made as to the contents thereof.

And said defendants and each of them on said appeals hereby rely upon the specifications of ground No. 4 as hereinbefore set out and commencing on line 22 of page 34 and to and including line 29 of page 34 of this transcript, as if specially set out and incorporated herein and to which reference is hereby made as to the contents thereof.

Wherefore, said defendants and each of them hereby pray that this Transcript on Appeal may be settled, allowed and certified as required by law, and that upon the final hearing as provided by law, that the complaint against said defendants and each of them may be dismissed or a new trial granted in said matter.

WILLIAM SEA, JR.,
LESLIE REED,
Attorneys for said Defendants.

Received a copy of the within this 25th day of May, 1915.

E. R. SIMON,
Asst. Dist. Atty.
E. E. LEIGHTON,
Special Prosecutor.

The above and foregoing Transcript on Appeal is hereby settled and allowed, and I hereby certify to the correctness of the same.

Dated: This 28th day of May, 1915.

J. B. HOFFMAN,
Justice of the Peace of the Township of Calexico, County of Imperial, State of California.

44 (Endorsed:) Filed May 28, 1915. M. S. Cook, County Clerk, by V. N. Thompson, Deputy.

Minute Entry, June 5, 1915.

In the Superior Court of the State of California in and for the County of Imperial.

No. 414.

Friday, June 5, 1915.

Court convened at 10:00 o'clock A. M.

Present:

Judge Hon. Franklin J. Cole.
Clerk Chas. E. Lukens, Jr.
Bailiff L. Wright.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

R. R. YOUNG and C. F. McGINIS, Defendants.

Hearing on Appeal.

This cause having been appealed to this Court from an order denying motion for new trial and from judgment made and entered on the 20th day of May, 1915, in the Justice's Court of the Township of Calexico, County of Imperial, State of California, on questions of law and fact, come now the People represented by Assistant District Attorney E. R. Simon, and said defendants represented by counsel William Sea, Jr.

Counsel for the respective parties submit the files and records herein, and present oral argument in support of and in opposition to the appeal, whereupon the cause is submitted to the Court for its consideration and Decision, and upon order of Court, cause stands submitted.

45 Minute Entry, July 16, 1915.

In the Superior Court of the State of California in and for the County of Imperial.

No. 413-414.

Present: Friday, July 16, 1915.

Judge, Hon. Franklin J. Cole.
Clerk, V. N. Thompson.
Bailiff, L. Wright.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

C. F. McGINIS and E. E. YOUNG, Defendants.

Order Modifying Judgment and Remanding the Action.

The Court having heretofore taken under submission the appeal of the defendants in the above-entitled actions No. 413 and 414, respectively, and being fully informed in the premises, now renders its decision. The Court orders that the appeal from the order denying the defendant's motion for new trial in each case in the Justice's Court be, and same is dismissed, that the judgment in each case be, and same is modified in this,—that the portion of said judgment reading as follows, "and until the fine be paid by the defendant to which such fine is assessed that he be imprisoned in said County Jail for a term at the rate of one day for each one dollar of fine, not exceeding in all one hundred eighty days for each defendant," be and the same is vacated, and set aside.

It is further ordered that the judgment so modified in each case be, and same is affirmed; that the actions, together with the judgments therein as modified be, and they are remanded to said Justice's Court of Calexico Township.

46 In the Superior Court of the State of California in and for the County of Imperial.

No. 414.

C. F. McGINIS and E. E. YOUNG, Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error.

Petition for Writ of Error.

To the Honorable, the Superior Court of the State of California in and for the County of Imperial and to the Honorable Franklin J. Cole, Presiding Judge thereof:

C. F. McGinis and E. E. Young, the Plaintiffs in Error in the above entitled cause, show by this their Petition to this Honorable

Court that in the records, proceedings and decisions in the above entitled action in the above entitled Court manifest errors have occurred greatly to the damage of said C. F. McGinis and said E. E. Young.

That as appears in the records and proceedings in said action there was drawn in question a federal question, to-wit:—whether or not the said Plaintiffs in Error were engaged in interstate and foreign commerce on the 16th day of April, 1915, when the cocaine, opium and morphine mentioned in said action was seized and said Plaintiffs in Error were arrested, and whether or not said cocaine, opium and morphine so seized was on the said 16th day of April, 1915, as mentioned in said action a shipment in interstate and foreign commerce from the United States to the Republic of Mexico, all of which more fully appears in the records and proceedings of the above entitled
47 action, and is specifically set forth in the assignment of errors filed herewith.

Wherefore, said petitioners pray that a writ of error be allowed to this Court so as to take said case to the Supreme Court of the United States, and that a transcript of the record, proceedings and papers upon which said judgment was rendered duly authenticated be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rule of such Court in such cases made and provided, and that the same may be by said Supreme Court of the United States inspected and corrected in accordance with the law and justice.

WILLIAM SEA, JR.,
Attorney for Plaintiff in Error.

Received copy of within Petition this Dec. 31, 1915.

GALEN NICHOLS,
District Atty.
E. R. SIMON,
Dep. Dist. Atty.
E. E. LEIGHTON,
Of Counsel.

(Endorsed:) Filed, Dec. 31, 1915. M. S. Cook, County Clerk, by V. N. Thompson, Deputy.

48 In the Superior Court of the State of California in and for the County of Imperial.

No. 414.

C. F. McGINIS and E. E. YOUNG, Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Defendants in Error.

Order of Allowance of Writ of Error.

On this 31st day of December, 1915, the Petition of C. F. McGinis and E. E. Young, the above named Plaintiffs in Error, for a Writ of

Error to the Supreme Court of the United States came on to be heard, the said Plaintiffs in Error being represented by William Sea, Jr., their attorney, and it appearing to the Court that said Petition should be allowed and that a transcript of the record proceedings and papers upon which the said judgment was rendered, properly certified, should be sent to the Supreme Court of the United States as prayed, in order that such proceedings may be had as may be just to correct any manifest errors as is alleged.

Now, therefore, it is hereby ordered that a writ of error be and the same is hereby allowed and that the said writ of error issue out of and under the seal of the above entitled Court by the Clerk thereof, upon separate bond being furnished by said E. E. Young and C. F. McGinis, conditioned according to law in the sum of Five Hundred ($500.00) Dollars; that a true copy of the record, proceedings and papers upon which the said judgment in this cause was rendered, together with the assignment of errors, writ of error and citation, duly certified according to law, shall be transmitted to the Supreme Court of the United States in order that said Court may inspect the same and take such action thereon as it deems proper according to law.

49 Dated December 31, 1915.

FRANKLIN J. COLE,
Presiding Judge of the Supreme Court of Imperial County, State of California.

Received copy of within order this Dec. 31, 1915.

GALEN NICHOLS,
District Attorney.
E. R. SIMON,
Dept. Dist. Atty.
E. E. LEIGHTON,
Of Counsel.

(Endorsed:) Filed Dec. 31, 1915. M. S. Cook, County Clerk, by V. N. Thompson, Deputy.

50 Minute Entry, December 31, 1915.

In the Superior Court of the State of California in and for the County of Imperial.

No. 414.

Friday, December 31, 1915.

Present:

Judge Franklin J. Cole.
Clerk V. H. Thompson.
Bailiff Roy Shepard.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

C. F. McGINIS and E. E. YOUNG, Defendant.

Order Granting Motion for Certificate of Judge.

Come the defendants, C. F. McGinis and E. E. Young, and each of them, by their attorney, William Sea, Jr., in open Court present their petition for allowance of Writ of error herein, for the purpose of taking this action to the Supreme Court of the United States; file their written Assignment of Errors, and present their motion that the Judge of this Court make and sign its Certificate as to Federal Question, based upon the ground stated in said written Assignment of Errors. Motion granted. The Court makes its certificate in the words and figures following:

Certificate of Judge as to Federal Question.

On motion of the Plaintiffs in Error, C. F. McGinis and E. E. Young, by William Sea, Jr., Esq., their Attorney, this Court orders it to be certified and made a part of the record in this case, Number 414, and the Honorable Franklin J. Cole, Presiding Judge of the Superior Court of the State of California, in and for the County of Imperial, does now certify that in said cause and on the hearing before this Court it was claimed, contended and alleged by the said Plaintiffs in Error, C. F. McGinis and E. E. Young, that on the 16th day of April, 1915, said C. F. McGinis and said E. E. Young
51 were engaged in interstate and foreign commerce between the United States and the Republic of Mexico at the time when the opium, cocaine and morphine mentioned in said action was seized and said C. F. McGinis and said E. E. Young were arrested; and it was further claimed, contended and alleged that said opium, cocaine and morphine so seized on the 16th day of April, 1915, was a shipment in transitu in interstate and foreign commerce between the United States and the Republic of Mexico; and it was further claimed, contended and alleged that said C. F. McGinis and said E. E. Young did not

have possession of said opium, cocaine and morphine in the City of Calexico, County of Imperial, State of California, on the 16th day of April, 1915, in violation of Section 8 of the Act of the Legislature of the State of California known as the "Poison Law," for the reason that said C. F. McGinis and said E. E. Young were on said 16th day of April, 1915, engaged in interstate and foreign commerce between the United States and the Republic of Mexico in being the consignees of said opium, cocaine and morphine at the City of Mexicali, Northern District of Baja California, Republic of Mexico, and for the further reason that said opium, cocaine and morphine mentioned in said cause and so seized was a shipment in transitu in interstate and foreign commerce between the United States and the Republic of Mexico to said C. F. McGinis and said E. E. Young, as consignees, at the City of Mexicali, Northern District of Baja California, Republic of Mexico; that it became and was material to the said cause for this Court to determine whether, under said claim, contention and allegation, said C. F. McGinis and said E. E. Young were on the 16th day of April, 1915, engaged in interstate and foreign commerce between the United States and the Republic of Mexico at the time when the opium, cocaine and morphine mentioned in said cause was seized and said C. F. McGinis and said E. E. Young were arrested; and whether, under said claim, contention and allegation, said opium, cocaine and morphine so seized on the 16th day of April,
52 1915, was a shipment in transitu in interstate and foreign commerce between the United States and the Republic of Mexico; and whether, under said claim, contention and allegation, said C. F. McGinis and said E. E. Young did not have possession of said opium, cocaine and morphine in the City of Calexico, County of Imperial, State of California, on the 16th day of April, 1915, in violation of Section 8 of the Act of the Legislature of the State of California, known as the "Poison Law," for the reason that said C. F. McGinis and said E. E. Young, as it was claimed, contended and alleged, were on said 16th day of April, 1915, engaged in interstate and foreign commerce between the United States and the Republic of Mexico in being the consignees of said opium, cocaine and morphine at the City of Mexicali, Northern District of Baja California, Republic of Mexico, and for the further reason that said opium, cocaine and morphine, as it was claimed, contended and alleged, was a shipment in transitu in interstate and foreign commerce between the United States and the Republic of Mexico to said C. F. McGinis and said E. E. Young, as consignees, at the City of Mexicali, Northern District of Baja California, Republic of Mexico; and whether, under said claims, contentions and allegations aforesaid, said C. F. McGinis and E. E. Young were entitled to have the said judgment reversed and the said cause dismissed; that the decision of this Court was adverse to the claims, contentions and allegations of said C. F. McGinis and said E. E. Young, in this: that said Court decided that said C. F. McGinis and said E. E. Young had said opium, cocaine and morphine wilfully and unlawfully in their possession on the 16th day of April, 1915, at the City of Calexico, County of Imperial, State of California, in violation of Section 8 of said "Poison Law,"

and that said C. F. McGinis and said E. E. Young were not deprived of any right, immunity or privilege under the Constitution and laws of the United States, and were not entitled to have said judgment reversed and the cause dismissed.

52a **Minute Entry, December 31, 1915.**

In the Superior Court of the State of California in and for the County of Imperial.

No. 414.

Friday, December 31, 1915.

Present:

Judge Franklin J. Cole.
Clerk V. N. Thompson.
Bailiff Roy Shepard.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

C. F. McGINIS and E. E. YOUNG, Defendants.

Order Granting Motion for Certificate of Judge.

Come the defendants, C. F. McGinis and E. E. Young, and each of them, by their attorney, William Sea, Jr., in open Court present their petition for allowance of Writ of Error herein, for the purpose of taking this action to the Supreme Court of the United States; file their written Assignment of Errors, and present their motion that the Judge of this Court make and sign its Certificate as to Federal Question, based upon the ground stated in said written Assignment of Errors. Motion granted. The Court makes its certificate in the words and figures following:

Certificate of Judge as to Federal Question.

On motion of the Plaintiffs in Error, C. F. McGinis and E. E. Young, by William Sea, Jr., Esq., their Attorney, this Court orders it to be certified and made a part of the record in this case, Number 414, and the Honorable Franklin J. Cole, Presiding Judge of the Superior Court of the State of California, in and for the County of Imperial, does now certify that in said cause and on the hearing before this Court it was claimed, contended and alleged by the said Plaintiffs in Error, C. F. McGinis and E. E. Young, that on the 16th day of April, 1915, said C. F. McGinis and said E. E.
52b Young were engaged in interstate and foreign commerce between the United States and the Republic of Mexico at the time when the opium, cocaine and morphine mentioned in said action was seized and said C. F. McGinis and said E. E. Young were

arrested; and it was further claimed, contended and alleged that said opium, cocaine and morphine so seized on the 16th day of April, 1915, was a shipment in transitu in interstate and foreign commerce between the United States and the Republic of Mexico; and it was further claimed, contended and alleged that said C. F. McGinis and said E. E. Young did not have possession of said opium, cocaine and morphine in the City of Calexico, County of Imperial, State of California, on the 16th day of April, 1915, in violation of Section 8 of the Act of the Legislature of the State of California, known as the "Poison Law," for the reason that said C. F. McGinis and said E. E. Young were on said 16th day of April, 1915, engaged in interstate and foreign commerce between the United States and the Republic of Mexico in being the consignees of said opium, cocaine and morphine at the City of Mexicali, Northern District of Baja California, Republic of Mexico, and for the further reason that said opium, cocaine and morphine mentioned in said cause and so seized was a shipment in transitu in interstate and foreign commerce between the United States and the Republic of Mexico to said C. F. McGinis and said E. E. Young, as consignees, at the City of Mexicali, Northern District of Baja California, Republic of Mexico; that it became and was material to the said cause for this Court to determine whether, under said claim, contention and allegation, said C. F. McGinis and said E. E. Young were on the 16th day of April, 1915, engaged in interstate and foreign commerce between the United States and the Republic of Mexico at the time when the opium, cocaine and morphine mentioned in said cause was seized and said C. F. McGinis and said E. E. Young were arrested; and whether, under said claim, contention and allegation, said opium, cocaine and morphine
52c so seized on the 16th day of April, 1915, was a shipment in transitu in interstate and foreign commerce between the United States and the Republic of Mexico; and whether, under said claim, contention and allegation, said C. F. McGinis and said E. E. Young did not have possession of said opium, cocaine and morphine in the City of Calexico, County of Imperial, State of California, on the 16th day of April, 1915, in violation of Section 8 of the Act of the Legislature of the State of California, known as the "Poison Law," for the reason that said C. F. McGinis and said E. E. Young, as it was claimed, contended and alleged, were on said 16th day of April, 1915, engaged in interstate and foreign commerce between the United States and the Republic of Mexico in being the consignees of said opium, cocaine and morphine at the City of Mexicali, Northern District of Baja California, Republic of Mexico, and for the further reason that said opium, cocaine and morphine, as it was claimed, contended and alleged, was a shipment in transitu in interstate and foreign commerce between the United States and the Republic of Mexico to said C. F. McGinis and said E. E. Young, as consignees, at the City of Mexicali, Northern District of Baja California, Republic of Mexico; and whether, under said claims, contentions and allegations aforesaid, said C. F. McGinis and E. E. Young were entitled to have the said judgment reversed and the said cause dismissed; that the decision of this Court was adverse to the claims, contentions and allegations of

said S. F. McGinis and said E. E. Young, in this:—that said Court decided that said C. F. McGinis and said E. E. Young had said opium, cocaine and morphine wilfully and unlawfully in their possession on the 16th day of April, 1915, at the City of Calexico, County of Imperial, State of California, in violation of Section 8 of said "Poison Law," and that said C. F. McGinis and said E. E. Young were not deprived of any right, immunity or privilege under the Constitution and laws of the United States, and were not entitled to have said judgment reversed and the cause dismissed.

53 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Superior Court of the State of California in and for the County of Imperial, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court of the State of California, in and for the County of Imperial before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of California, Plaintiff, vs. C. F. McGinis and E. E. Young, Defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution,
54 or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said C. F. McGinis and E. E. Young, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the Seventh day of March, in the year of our Lord one thousand nine hundred and sixteen.

[Seal of the U. S. District Court, Southern Dist. of California.]

WM. M. VAN DYKE,
Clerk of the District Court of the United States in and for the Southern District of California.

Allowed by
FRANKLIN J. COLE,
Presiding Judge of the Superior Court of the State of California in and for the County of Imperial.

54½ [Endorsed:] #414. Superior Ct. Supreme Court of the United States, October Term, 191–. C. F. McGinis and E. E. Young, Plaintiffs in Error, vs. The People of the State of California, Defendant in Error. Writ of Error. Received a copy of the within this 11th day of March, 1916. Galen Nichols, Dis. Atty. Filed Mar. 11, 1916. M. S. Cook, County Clerk, by V. N. Thompson, Deputy.

55 In the Superior Court of the State of California in and for the County of Imperial.

No. 414.

C. F. McGinis and E. E. Young, Plaintiffs in Error,

vs.

The People of the State of California, Defendant in Error.

Citation on Writ of Error.

United States of America,
State of California, ss:

To the People of the State of California and to E. E. Leighton, Esq., and Galen Nichols, Esq., District Attorney of Imperial County, State of California, and Ernest R. Simon, Esq., Deputy District Attorney, Attorneys for Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States to be *heard* in the City of Washington, in the District of Columbia, within sixty days from the date hereof pursuant to an order of the above entitled Court allowing said Writ of Error from that certain Judgment therein made and entered on the 16th day of July, 1915, in said action Numbered 414, in the above entitled Court, wherein The People of the State of California is Plaintiff and C. F. McGinis and E. E.

Young are defendants, to show cause, if any there be, why the judgment rendered in said cause against said C. F. McGinis and E. E. Young, as in said order allowing said Writ of Error mentioned, should not be *called* and why justice should not be done to
56 the parties in that behalf.

Witness, the Honorable Franklin J. Cole, Presiding Judge of the Superior Court of the State of California, in and for the County of Imperial, this 11th day of March, 1916.

FRANKLIN J. COLE,
Presiding Judge of the Superior Court of the State of California in and for the County of Imperial.

56½ [Endorsed:] No. 414. In the Superior Court of the State of California in and for the County of Imperial. C. F. McGinis and E. E. Young, Plaintiffs in Error, vs. The People of the State of California, Defendant in Error. Citation on Writ of Error. William Sea, Jr., Attorney for Plaintiffs in Error, Calexico, Cal. Received a copy of the within this 11th day of March, 1916. Galen Nichols, Dis. Atty. Filed Mar. 11, 1916. M. S. Cook, County Clerk, by V. N. Thompson, Deputy.

57 In the Superior Court of the State of California in and for the County of Imperial.

No. 414.

C. F. McGinis and E. E. Young, Plaintiffs in Error,

vs.

The People of the State of California, Defendant in Error.

Assignment of Errors.

Now comes C. F. McGinis and E. E. Young, the above named Plaintiffs in Error, and file the following assignment of errors upon which they and each of them will rely on the prosecution of the Writ of Error in the above entitled action from the judgment made and entered by the above entitled Court on the 16th day of July, 1915:

1. That the Superior Court of the State of California, in and for the County of Imperial, erred in rendering and entering said judgment.

2. That said Superior Court erred in not reversing said judgment.

3. That said Superior Court erred in not dismissing said cause.

4. That said Superior Court erred in dismissing said appeal.

5. That said Superior Court erred in dismissing the appeal from the order denying the Defendants' Motion for New Trial.

6. That said Superior Court erred in vacating and setting aside

part of said judgment of the Justice's Court and not vacating and setting aside the whole of said judgment.

7. That said Superior Court erred in affirming said Judgment as modified.

8. That said Superior Court erred in remanding said cause to the Justice's Court of Calexico Township.

58 9. That said Superior Court erred in not reversing said Judgment and dismissing said cause when all the evidence showed that said C. F. McGinis and E. E. Young were engaged in interstate and foreign commerce between the United States of America and the Republic of Mexico at the time said opium, cocaine and morphine were seized.

10. That said Superior Court erred in not reversing said judgment and dismissing said cause when all the evidence showed that said opium, cocaine and morphine seized was a shipment in transitu in interstate and foreign commerce between the United States and the Republic of Mexico.

11. That said Superior Court erred in not reversing said judgment and dismissing said cause when all the evidence showed that said opium, cocaine and morphine seized was not in the possession of said C. F. McGinis and E. E. Young in violation of Section 8 of the Act of the Legislature of the State of California, known as the "Poison Law."

12. That said Superior Court erred in not reversing said judgment and dismissing said cause when all the evidence showed that said opium, cocaine and morphine seized was in transitu in interstate and foreign commerce between the United States and the Republic of Mexico via common carriers.

13. That said Superior Court erred in not reversing said judgment and dismissing said cause when the evidence showed that said opium, cocaine and morphine at the time of seizure was in the hands of a custom house broker, duly licensed by the United States and by the Republic of Mexico, as the connecting carrier for said shipment in interstate and foreign commerce from the United States to the Republic of Mexico.

14. That said Superior Court erred in deciding adverse to the claims, contentions and allegations of said C. F. McGinis and E. E. Young that said opium, cocaine and morphine so seized was a shipment in transitu in interstate and foreign commerce on the

59 16th day of April, 1915.

15. That said Superior Court erred in deciding adverse to the claims, contentions and allegations of said C. F. McGinis and E. E. Young that on said 16th day of April, 1915, they were engaged in interstate and foreign commerce between the United States and the Republic of Mexico and did not have said opium, cocaine and morphine wilfully and unlawfully in their possession in violation of Section 8 of said Act of the said Legislature.

16. That said Superior Court erred in holding and deciding that said C. F. McGinis and E. E. Young were not deprived of any right, immunity or privilege under the Constitution and laws of the United States by said seizure of said opium, cocaine and morphine.

17. That said Superior Court erred in holding and deciding that

F. McGinis and E. E. Young were not deprived of any immunity or privelege under the Constitution and laws of the States by their arrest for a violation of said section of said the said Legislature.

That said Superior Court erred in not holding and deciding id seizure of said opium, cocaine and morphine was unlaw- l in violation of the right, immunity and privelege of said cGinis and E. E. Young under the Constitution and laws of ited States as a shipment in transitu in interstate and foreign ce between the United States and the Republic of Mexico.

That said Superior Court erred in not holding and deciding e arrest of said C. F. McGinis and E. E. Young was unlawful violation of the right, immunity and privelege of said C. Ginis and E. E. Young under the Constitution and laws of ited States as the consignees in the Republic of Mexico of pment of said opium, cocaine and morphine from the United o the Republic of Mexico.

That said Superior Court erred in not holding that the ver- dict rendered in said cause was contrary to law.

21. That said Superior Court erred in not holding that said verdict in said cause was contrary to the evidence.

That said Superior Court erred in not holding that said 's Court erred in giving certain instructions to the jury as ed by the prosecution and numbered 1, 3, 4, 6, 7, 8, 9, 10, 13 and 14, as more specifically set out on pages 24 and 25 Transcript of the Case on Appeal.

That said Superior Court erred in not holding that said 't Court erred in refusing to give certain instructions to the quested by the Defendants and numbered VII, VIII, IX, XII and XIII as more specifically set out on pages 26 and he Transcript of the Case on Appeal.

That said Superior Court erred in not holding that said 's Court erred in refusing to give the following instruction ed by the jury: "We desire that the Court instruct us as to finition of a common carrier," as set out on page 27 of the ript of the Case on Appeal, line 10 thereof.

That said Superior Court erred in not holding that said 's Court erred in refusing to give the following instruction ed by the jury: "We desire that the Court instruct us as to finition of a common carrier," as set out on page 27 of the ript of the Case on Appeal, line 11 thereof.

That said Superior Court erred in not holding that said 's Court erred in ruling upon the introduction of evidence as pecifically set out on pages 27 to 33 inclusive of the Transcript Case on Appeal and numbered on said pages "p. 1." to "p. ve,

Wherefore, said Plaintiffs in Error pray that said judgment of Superior Court be reversed and that said Superior Court be ed to enter a judgment dismissing said cause and reversing the ent of said Justice's Court.

WILLIAM SEA, Jr.,
Attorney for Plaintiffs in Error.

PEOPLE OF THE STATE OF CALIFORNIA.

[Endorsed:] #414. In the Superior Court of the State of California in and for the County of Imperial. C. F. McGinns and E. E. Young, Plaintiffs in Error, vs. The People of the State of California, Defendant in Error. Assignment of Errors. William [illegible], Jr., Attorney for Plaintiffs in Error, Calexico, Cal. Received copy of within Assignment of Errors this Dec. 31, 1915. Galen Nichols, Dist. Atty.; E. R. Simon, Dep. Dist. Atty.; E. E. Leighton, Counsel. Filed Dec. 31, 1915. M. S. Cook, County Clerk, by [illegible] N. Thompson, Deputy.

In the Superior Court of the State of California in and for the County of Imperial.

No. 414.

C. F. McGinns and E. E. Young, Plaintiffs in Error,

vs.

The People of the State of California, Defendant in Error.

Amendments to Assignment of Errors.

Now comes the above named Plaintiffs in Error and file the following amendments to the Assignment of Errors heretofore filed as follows:—

I. Amendment to Assignment of Error Numbered 22 by setting out said instructions of the Court, to wit:—

1. That said Superior Court erred in not holding that said Justice's Court erred in giving the following instruction as requested by the prosecution and numbered 1 as follows:—

The state has the police power of regulating the sale and use of cocaine and other poisons, and has limited the possession of cocaine to certain classes of persons who are instrusted with the possession for sale and use *by* legitimate purposes.

3. That said said Superior Court erred in not holding that said Justice's Court erred in giving the following instruction as requested by the prosecution and numbered 3 as follows:—

It is not incumbent upon the State to prove that the defendant is not a physician, pharmacist, dentist or veterinary surgeon, or that he did not obtain the cocaine upon the written order or prescription of a physician, dentist or veterinary surgeon or any other exception which is negative in the complaint. These facts are presumed to be peculiarly within the knowledge of the defendant and if he claims to place himself within one of these exceptions, it is incumbent upon him to furnish satisfactory proof to you that he does in fact come within one of these exceptions which are negative in the complaint, such as being a physician, dentist or veterinary surgeon.

4. That said Superior Court erred in not holding that said Justice's Court erred in giving the following instruction as requested by the prosecution and numbered 4 as follows:—

ch the defendants are charged with unlawfully having in their
session in this action, and that the control of the Express Com-
y over said cocaine has ceased, then said cocaine would be legally
he possession of the defendants.

1. That said Superior Court erred in not holding that said
tice's Court erred in giving the following instruction as requested
he prosecution and numbered 11, as follows:—

nd if you further believe, from the evidence, beyond a reason-
doubt, that, after receipting for said cocaine to the Express
npany and paying the charges thereon, the defendants employed
W. I. McCoy, to transport said cocaine to any place whatever,
W. I. McCoy would be the agent of the defendants, and McCoy
ld only have the custody of said cocaine and the defendants
le still have the dominion and control over said cocaine, and
cocaine would be legally in the possession of the defendants.

2. That said Superior Court erred in not holding that said
tice's Court erred in giving the following instruction as requested
he prosecution and numbered 12, as follows:—

f you believe, beyond a reasonable doubt, from the evidence, that
defendants had in their possession in the County of Imperial
State of California certain cocaine, as charged in the complaint
ein, and that said possession was unlawful under the laws of the
e of California, then you are instructed that the fact that the
ndants may have intended to export said cocaine to a foreign
ntry, if it be a fact, would be no defense in this action.

3. That said Superior Court erred in not holding that said
tice's Court erred in giving the following instruction as requested
he prosecution and numbered 13, as follows:—

You are further instructed that there are no laws of the federal
ernment which would protect the defendants from prosecution
this State, for having cocaine unlawfully in their possession
under the laws of this State.

14. That said Superior Court erred in not holding that
said Justice's Court erred in giving the following instruction
requested by the prosecution and numbered 14, as follows:

y reasonable doubt is not meant that the People must prove the
ndant guilty beyond a possible doubt or that demonstration of
defendant's guilt must be made. For nearly all matters in
man affairs are open to possible doubt and demonstration is rarely
sible.

I. Amendment to Assignment of Error Numbered 23 by setting
said instructions refused by the said Justice's Court, to-wit:

That said Superior Court erred in not holding that said Jus-
's Court erred in not giving the following instruction requested
he defendants and numbered VII, as follows:

ou are instructed that you must give just as much weight to the
and regulations of the United States as to the laws of the State
California, and that where the State laws conflicts with the laws
regulations of the United States upon the same subject, the laws
regulations of the United States control.

That said Superior Court erred in not holding that said Jus-

e's Court erred in not giving the following instruction request
the Defendants and numbered VIII, as follows:

You are instructed that if you find from the evidence that t
fendants had control of the cocaine, but the evidence shows th
e cocaine was in transit, or being transported, from the Unit
ates to Mexico through a chain of common carriers, then the d
ndants did not have possession of the cocaine in violation of t
ws of the State of California, and it is your duty to acquit them.

3. That said Superior Court erred in not holding that said Ju
e's Court erred in not giving the following instruction request
the defendants and numbered IX, as follows:

You are instructed that if you find from the evidence that t
caine was in transit, being transported from the United States
exico through a chain of common carriers, then it is not nec
the defendants to prove that they are either of them re
ysician, dentist, pharmacist or veterinary surgeon practicing
e State of California, or that the cocaine — procured upon the
a registered physician, dentist, pharmacist or veterinary surg

4. That said Superior Court erred in not holding that said Ju
e's Court erred in not giving the following instruction request
by the defendants and numbered X, as follows:

You are instructed that if you find from the evidence th
the cocaine was in transit or being transported from the Uni
ates to Mexico through a system of common carriers, then
w of this case that any transportation of passengers or merch
rough a state from one state to another or from the United St
a foreign country is within the exclusive jurisdiction of said
ion by Congress or by the Treasury Department of the Uni
ates.

5. That said Superior Court erred in not holding that said J
e's Court erred in not giving the following instruction request
the defendants and numbered XI, as follows:

You are instructed that if you find from the evidence that t
cocaine was being transported from the United States to Mexico,
in the law of this case that the power of Congress, and
treasury department of the United States
cannot be restricted by the laws of or the
of any state.

6. That said Superior Court erred in not holding that said J
e's Court erred in not giving the following instruction request
the defendants and numbered XII, as follows:

You are instructed that the power vested in Congress by Section
of the laws of this State, it is the
law of this State that the power of Congress, and
treasury department of the United States
cannot be restricted by the laws of or the
of any state.

7. That said Superior Court erred in not holding that said Justice's Court erred in not giving the following instruction requested by the defendants and numbered XIII, as follows:

You are instructed that it is the law of this case that the independence of the commercial power of the United States exercised through the Congress of the United States or through the decisions of the Treasury Department of the United States and the police power and the delimitations between them must be always recognized and observed.

WILLIAM SEA, JR.
Attorney for Plaintiffs in Error.

65½ [Endorsed:] #414. In the Superior Court of the State of California in and for the County of Imperial. C. F. McGinnis and E. E. Young, Plaintiffs in Error, vs. The People of the State of California, Defendant in Error. Amendments to Assignment of Errors. Received copy of within this Feb. 7, 1916. Galen Nichols, District Attorney. Filed Feb. 7, 1916. M. S. Cook, County Clerk, by V. N. Thompson, Deputy. William Sea, Jr., Attorney for Plaintiffs in Error.

66 In the Superior Court of the State of California in and for the County of Imperial.

C. F. McGINNIS and E. E. YOUNG, Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error.

Certificate of Clerk.

STATE OF CALIFORNIA,
County of Imperial, ss:

I, M. S. Cook, County Clerk and Ex-officio Clerk of the Superior Court of the County of Imperial, State of California, do hereby certify, that the foregoing transcript, consisting of 65 pages, constitutes a full, true and correct copy of the proceedings had, papers filed, and orders entered in the above-entitled cause, as set forth therein, and as the same appear on file and of record in this office, with the exception of the Writ of Error, Citation, Assignment of Errors and Amendment to Assignment of Errors herewith attached pages 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64 and 65, respectively, which are the original Writ, Assignment, Citation and Amendment to Assignment of Errors.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1917

C. F. McGINIS and E. E. YOUNG,
Plaintiffs in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA.
No. 133

C. F. McGINIS and E. E. YOUNG,
Plaintiffs in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA.
No. 134

In Error to the Superior Court of Imperial County, State of California.

BRIEF FOR PLAINTIFFS IN ERROR.

These two cases are in this court on writs of error to the Superior Court of the State of California, in and for the County of Imperial, to review its judgments, affirming, with slight modifications, the judgments of the Justice's Court of Calexico Township, County of Imperial, California, by which plaintiffs

in error here, defendants in the trial Court, were sentenced to pay fines and to be imprisoned.

The two cases are considered together for the reason that the main facts relating to a certain shipment of drugs from the United States to Mexico are the same, the only exception being that Case No. 133 deals with part of the said shipment, said part consisting of a quantity of opium, and Case No. 134 deals with part of said shipment, said part consisting of a quantity of cocaine. The evidence in both cases is practically the same.

The actions were brought under Section 8 of an Act entitled, "An Act to regulate the sale and use of poisons in the State of California and providing a penalty for the violation thereof", approved March 5, 1907, amended and approved June 11, 1913.

The State Superior Court held that a conviction under that section of said Act did not deprive the plaintiffs in error of any right, privilege or immunity under the Constitution and laws of the United States, and that said shipment was not *in transitu* in interstate and foreign commerce, and that plaintiffs in error were not engaged in interstate and foreign commerce.

This ruling is set forth in each case in a *Certificate of Judge as to Federal Question.* (Rec. pp. 38-40, Case No. 134; Rec. pp. 28-30, Case No. 133).

Jurisdiction is maintained on the grounds that the said section of said Act is repugnant to the interstate and foreign commerce clause of the Federal Constitution, and that the conviction in each case is

repugnant to said clause, and that said section
said Act is also repugnant to the privileges and
munities clause of the Federal Constitution, and
t the conviction in each case is also in conflict
h that clause. (For the sake of brevity, here-
er each Case will be denoted only by Case num-
.)

Statement of the Case.

FACTS.

n April, 1915, the plaintiffs in error were in
iness at Mexicali, Republic of Mexico, and were
consignees of a shipment from the United
tes to them in the Republic of Mexico.

This shipment, consigned to plaintiffs in error,
ived at Calexico, State of California, via Wells,
rgo & Company, and was then put into the hands
W. L. McCoy, a customhouse broker, duly li-
sed by the United States and the Republic of
xico, for the purpose of continuing the shipment
he plaintiffs in error, the consignees, in the Re-
lic of Mexico.

Calexico is on the United States side of the inter-
ional border, and Mexicali, directly opposite and
joining Calexico, is on the Mexican side of the
. Calexico is the terminus of Wells, Fargo &
mpany at that point in the State of California.

said customhouse broker had weighed the con-
ts of said shipment to comply with the Mexican
and had made out the American and Mexican

manifest papers for the exportation of said shipment to the plaintiffs in error, the consignees, at Mexicali, Mexico, before the seizure of said shipment.

Thereafter and on April 16th, 1915, while said shipment was still in the hands of said customhouse broker for the purpose of continuing said shipment to the plaintiffs in error in Mexicali, Mexico, it was seized by Roy Jones, an inspector for the State Board of Pharmacy of California. Plaintiffs in error were in the Republic of Mexico at the time of the seizure and at no time had possession of the shipment or any part of the contents of said shipment.

PROCEEDINGS FOLLOWING SEIZURE.

Thereafter and on said day, said inspector swore to three complaints against plaintiffs in error in the Justice's Court of Calexico Township, County of Imperial, State of California, one complaint charging the wilful and unlawful possession by said plaintiffs in error at Calexico, California, of the said opium, and the second complaint charging the wilful and unlawful possession by said plaintiffs in error at Calexico, California, of the said cocaine, and the third complaint charging the wilful and unlawful possession by said plaintiffs in error at Calexico, California, of a quantity of morphine, all in violation of Section 8 of an Act entitled "An Act to regulate the sale and use of poison in the State of California and providing a penalty for the violation

thereof", approved March 5, 1907, amended and approved June 11, 1913, which said Section 8 reads in part as follows:

"Sec. 8. It shall be unlawful for any person, firm or corporation to sell, furnish or give away or offer to sell, furnish or give away or to have in their or his possession any cocaine, opium, morphine, codeine, heroin, alpha eucaine, beta eucaine, nova caine, flowering tops and leaves, extracts, tinctures and other narcotic preparations of hemp or loco weed (Cannabis sativa), Indian hemp, or chloral hydrate or any of the salts, derivatives or compounds of the foregoing substances or any preparation or compound containing any of the foregoing substances or their salts, derivatives or compounds excepting upon the written order or prescription of a physician, dentist or veterinary surgeon, licensed to practise in this state, which order or prescription shall be dated and shall contain the name of the person for whom prescribed, written in by the person writing the prescription, or if ordered by a veterinary surgeon it shall state the kind of animal for which ordered and shall be signed by the person giving the prescription or order. * * * *provided,* that the above provisions shall not apply to sales at wholesale by jobbers, wholesalers and manufacturers to pharmacies, as defined in section one of an act entitled 'An Act to regulate the practise of pharmacy in the State of California and to provide a penalty for the violation thereof; and for the appointment of a board to be known as the California State Board of Pharmacy', approved March 20, 1905, and acts amendatory thereof; or physicians, nor to each other, nor to the sale at retail in pharmacies by pharmacists to physicians, dentists or veterinary surgeons duly licensed to practise in this state; *provided, further,* that all such wholesale jobbers, wholesalers and manufacturers, in this section men-

tioned shall keep in a manner readily accessible, the written orders or blank forms required to be preserved under the provisions of section two of the act of congress approved December 17, 1914, relating to the production, importation, manufacture, compounding, sale, dispensing or giving away of opium or coco leaves and salts, derivatives or preparations. * * * ."

Thereupon warrants of arrest were issued and the plaintiffs in error were called over from Mexico and arrested in Calexico.

Thereafter and on May 14th, 1915, upon their pleas of not guilty, plaintiffs in error were tried jointly by a jury in said Justice's Court, upon the charge involving the possession of said opium, and thereupon convicted, and thereafter and on the 17th and 18th days of May, 1915, upon their pleas of not guilty, plaintiffs in error were tried jointly by a jury in said Justice's Court, upon the charge involving the possession of said cocaine, and thereupon convicted. As to the morphine case the jury disagreed and the case is still pending for a retrial.

Thereafter plaintiffs in error moved in both cases for a new trial which said motions were denied. Thereupon a judgment of fine and imprisonment was entered in each case. Thereafter appeals were taken in both cases to the Superior Court of the State of California, in and for the County of Imperial from the orders denying the motions for new trial and from the judgments of said Justice's Court.

Thereafter, and after the Federal questions hereinafter mentioned were claimed, contended, argued

and decided against, the said appeals were dismissed and the judgments of conviction of a violation of said Section 8 were affirmed with slight modifications.

Thereafter plaintiffs in error sued out these writs of error to this Court and the Superior Court of Imperial County made and entered in each case a Certificate of Judge as to Federal Question presented, argued and determined.

THE CONTENTIONS OF PLAINTIFFS IN ERROR.

The contentions involved are as follows:

a. The plaintiffs in error contend that they did not, in both cases, have possession of said shipment or any part of the contents thereof in violation of said Section 8 of said Act.

b. The plaintiffs in error contend that they were, in both cases, engaged in interstate and foreign commerce between the United States and the Republic of Mexico, as the consignees of said shipment, at the time when said shipment was seized and when they were arrested.

c. The plaintiffs in error contend that, in both cases, said shipment was *in transitu* in interstate and foreign commerce between the United States and the Republic of Mexico.

d. The plaintiffs in error contend that they were, in both cases, deprived of a right, immunity and privilege under the Constitution and laws of the

United States by reason of said seizure, arrest, conviction and sentence of fine and imprisonment.

e. The plaintiffs in error contend that in Case No. 133 the trial Court and jury were guilty of gross misconduct sufficient to justify a reversal.

MANNER IN WHICH CONTENTIONS WERE RAISED.

1. IN JUSTICE'S COURT.

a. The foregoing contentions "a" to "e", inclusive, were raised in said Justice's Court by the testimony of both the prosecution and the defense and by requesting certain instructions to the jury in each case.

b. The foregoing contentions "a" to "e", inclusive, were raised in Case No. 133 in said Justice's Court on a motion for new trial, including, *inter alia*, the Specifications of Error (Rec. pp. 15-21).

c. The foregoing contentions "a" to "d", inclusive, were raised in Case No. 134 in said Justice's Court on a motion for new trial, including, *inter alia*, the Specifications of Error (Rec. pp. 19-29).

2. IN SUPERIOR COURT.

All the foregoing contentions were raised in each case in the said Superior Court by appeal from the order denying new trial and from the judgment upon a transcript of the case (Rec. pp. 1-24, inclusive, 133; Rec. pp. 1-32, inclusive, 134) on such appeal, including, *inter alia*, the specifications of error hereinafter set out *totidem verbis*.

SPECIFICATIONS OF ERROR.

1. That the Superior Court of the State of California, in and for the County of Imperial, erred in rendering and entering said judgment of the 16th day of July, 1915, in each case.

2. That said Superior Court erred in not reversing said judgment.

3. That said Superior Court erred in not dismissing said cause.

4. That said Superior Court erred in dismissing said appeal.

5. That said Superior Court erred in dismissing the appeal from the order denying the defendants' motion for new trial.

6. That said Superior Court erred in vacating and setting aside part of said judgment of the Justice's Court and not vacating and setting aside the whole of said judgment.

7. That said Superior Court erred in affirming said judgment as modified.

8. That said Superior Court erred in remanding said cause to the said Justice's Court.

9. That said Superior Court erred in not reversing said judgment and dismissing said cause when all the evidence showed that said C. F. McGinis and E. E. Young were engaged in interstate and foreign commerce between the United States and the Republic of Mexico at the time said opium, cocaine and morphine were seized.

10. That said Superior Court erred in not reversing said judgment and dismissing said cause when all the evidence showed that said opium, cocaine and morphine seized was a shipment *in transitu* in interstate and foreign commerce between the United States and the Republic of Mexico.

11. That said Superior Court erred in not reversing said judgment of said Justice's Court and dismissing said cause when all the evidence showed that said opium, cocaine and morphine seized was not in the possession of said C. F. McGinis and E. E. Young in violation of Section 8 of the Act of the Legislature of the State of California, known as the "Poison Law".

12. That said Superior Court erred in not reversing said judgment of said Justice's Court and dismissing said cause when all the evidence showed that said opium, cocaine and morphine seized was *in transitu* in interstate and foreign commerce between the United States and the Republic of Mexico via common carriers.

13. That said Superior Court erred in not reversing said judgment of said Justice's Court and dismissing said cause when the evidence showed that said opium, cocaine and morphine at the time of seizure was in the hands of a customhouse broker, duly licensed by the United States and by the Republic of Mexico, as the connecting carrier for said shipment in interstate and foreign commerce from the United States to the Republic of Mexico.

14. That said Superior Court erred in deciding adverse to the claims, contentions and allegations of said C. F. McGinis and E. E. Young that said opium, cocaine and morphine so seized was a shipment *in transitu* in interstate and foreign commerce on the 16th day of April, 1915.

15. That said Superior Court erred in deciding adverse to the claims, contentions and allegations of said C. F. McGinis and E. E. Young that on said 16th day of April, 1915, they were engaged in interstate and foreign commerce between the United States and the Republic of Mexico and did not have said opium, cocaine and morphine wilfully and unlawfully in their possession in violation of said Section 8 of said Act.

16. That said Superior Court erred in holding and deciding that said C. F. McGinis and E. E. Young were not deprived of any right, immunity or privilege under the Constitution and laws of the United States by said seizure of said opium, cocaine and morphine.

17. That said Superior Court erred in holding and deciding that said C. F. McGinis and E. E. Young were not deprived of any right, immunity or privilege under the Constitution and laws of the United States by their arrest for a violation of said Section 8 of said Act.

18. That said Superior Court erred in not holding and deciding that said seizure of said opium, cocaine and morphine was unlawful and in violation of the right, immunity and privilege of said C. F.

McGinis and E. E. Young under the Constitution and laws of the United States as a shipment *in transitu* in interstate and foreign commerce between the United States and the Republic of Mexico.

19. That said Superior Court erred in not holding and deciding that the arrest of said C. F. McGinis and E. E. Young was unlawful and in violation of the right, immunity and privilege of said C. F. McGinis and E. E. Young under the Constitution and laws of the United States as the consignees in the Republic of Mexico of said shipment of said opium, cocaine and morphine from the United States to the Republic of Mexico.

20. That said Superior Court erred in not holding that the verdict of the jury rendered in each case was contrary to law.

21. That said Superior Court erred in not holding that said Justice's Court erred in refusing to give the following instruction requested by the defendants in both cases and numbered VII, as follows:

> "You are instructed that you must give just as much weight to the laws and regulations of the United States as to the laws of the State of California, and that where the State law conflicts with the laws and regulations of the United States upon the same subject, the laws and regulations of the United States control".

22. That said Superior Court erred in not holding that said Justice's Court erred in refusing to give the following instruction requested by the defendants and numbered VIII, as follows:

"You are instructed that if you find from the evidence that the defendants had control of the *opium* [in the one case, and of *cocaine* in the second case], but the evidence shows that the *opium* [in the one case, and *cocaine* in the second case] was in transit, or being transported from the United States to Mexico through a chain of common carriers, then the defendants did not have the possession of the *opium* (in the one case, and of *cocaine* in the second case) in violation of the laws of the State of California, and it is your duty to acquit them". (Italics ours.)

23. That said Superior Court erred in not holding that said Justice's Court erred in refusing to give the following instruction requested by the defendants and numbered IX, as follows:

"You are instructed that if you find from the evidence that the *opium* (in the one case, and *cocaine* in the second case) was in transit, being transported from the United States to Mexico through a chain of common carriers, then it is not necessary for the defendants to prove that they are either of them registered physician, dentist, pharmacist or veterinary surgeon practicing in this State, or that the *opium* (in the one case, and *cocaine* in the second case) was procured upon the order of a registered physician, dentist, pharmacist or veterinary surgeon". (Italics ours.)

24. That said Superior Court erred in not holding that said Justice's Court erred in refusing to give the following instruction requested by the defendants and numbered X, as follows:

"You are instructed that if you find from the evidence that the opium was in transit or being transported from the United States to Mexico

through a system of common carriers, then it is the law of this case that any transportation of passengers or merchandise through a state or from one state to another or from the United States to a foreign country is within the exclusive jurisdiction of and legislation by Congress".

25. That said Superior Court erred in not holding that said Justice's Court erred in refusing to give the following instruction requested by the defendants and numbered XI, as follows:

"You are instructed that if you find from the evidence that this *opium* (in the one case, and *cocaine* in the second case) was being transported from the United States to Mexico, then it is the law of this case that the power of Congress to control commerce between the several states and between the United States and a foreign country cannot be restricted by the laws or authorities of any state". (Italics ours.)

26. That said Superior Court erred in not holding that said Justice's Court erred in refusing to give the following instruction requested by the defendants and numbered XII, as follows:

"You are instructed that the charge brought against the defendants in this case is under a section of the laws of this State, and is exercised as the police power of the State, and that it is the law of this case, as far as the police power of the State of California is concerned, that the commerce between the States or between the United States and a foreign country has been confined exclusively to Congress by the Constitution of the United States (in Case No. 194 "or to the decisions of the Treasury Department of the United States"), and such commerce or transportation of merchandise is

not within the jurisdiction of any state unless placed there by Congressional action".

27. That said Superior Court erred in not holding that said Justice's Court erred in refusing to give the following instruction requested by the defendants and numbered XIII, as follows:

"You are instructed that it is the law of this State that the independence of the commercial power of the United States and the police power of the State and the delimitations between them must always be recognized and observed".

28. That said Superior Court erred in not holding that said verdict in each case was contrary to the evidence.

29. That said Superior Court erred in not holding that said Justice's Court erred in refusing to give the following instruction requested by the jury in Case No. 134, as follows:

"We desire that the Court instruct us as to the definition of a common carrier".

30. That said Superior Court erred in not holding that said Justice's Court erred in refusing to give the following instruction requested by the jury in Case No. 134, as follows:

"We desire that the Court instruct us as to the definition of a customhouse broker".

31. That said Superior Court erred in not holding that said Justice's Court erred in giving the following instruction as requested by the prosecution and numbered 1, as follows:

"The state has the police power of regulating the sale and use of cocaine and other poisons, and has limited the possession of cocaine to certain classes of persons who are intrusted with the possession for sale and use for legitimate purposes". (Case No. 134.)

32. That said Superior Court erred in not holding that said Justice's Court erred in giving the following instruction requested by the prosecution and numbered 3, as follows:

"It is not incumbent upon the State to prove that the defendant is not a physician, pharmacist, dentist or veterinary surgeon, or that he did not obtain the cocaine upon the written order or prescription of a physician, dentist or veterinary surgeon or any other exception which is negative in the complaint. These facts are presumed to be peculiarly within the knowledge of the defendant and if he wishes to place himself within one of these exceptions, it is incumbent upon him to furnish satisfactory proof to you that he does not come within one of these exceptions which are negative in the complaint, such as being a physician, dentist or veterinary surgeon." (Case No. 134.)

33. That said Superior Court erred in not holding that said Justice's Court erred in giving the following instruction as requested by the prosecution and numbered 4, as follows:

duly licensed to practise in the State of California, according to law." (Case No. 134.)

4. That said Superior Court erred in not holding that said Justice's Court erred in giving the following instruction requested by the prosecution numbered 6, as follows:

"When goods come to rest in the State of California when they have been shipped from another state they are immediately incorporated as state property and subject to state laws, though still in the original package". (Case No. 134.)

5. That said Superior Court erred in not holding that said Justice's Court erred in giving the following instruction requested by the prosecution numbered 7, as follows (Case No. 134):

"If Wells, Fargo Co. had received these goods from a party in St. Louis who had the right to have them in his possession, to be delivered by them to the consignee at Mexicali, Mexico, the having the same in possession at Calexico by the consignees, the defendants, would be in violation of Sec. 8 of the Poison Act; provided, it is also found that McGinnis and Young, the defendants, are not registered pharmacists, or physicians, dentists or veterinary surgeons, or wholesalers to pharmacists in the State of California".

6. That said Superior Court erred in not holding that said Justice's Court erred in giving the following instruction requested by the prosecution numbered 8, as follows (Case No. 134):

"If a shipment of morphine which is shipped from St. Louis by an Express Company to be delivered by the Express Company to the con-

signees in Mexico, and the shipment is received and receipted for in California, the shipment to a foreign country is then ended, the goods having been delivered to the consignee, and the consignee is amenable to the State laws regulating the sale and use of poisons in relation to said cocaine".

37. That said Superior Court erred in not holding that said Justice's Court erred in giving the following instruction requested by the prosecution and numbered 9, as follows (Case No. 134):

"Manual possession or possession in hand is not necessary to prove that the defendants had cocaine in possession. Possession means dominion and control, and if you find from all the evidence beyond a reasonable doubt that the defendants had within their dominion and control cocaine, in the manner and form as alleged in the complaint, you must find them guilty even though they did not have it in their actual manual possession."

38. That said Superior Court erred in not holding that said Justice's Court erred in giving the following instruction requested by the prosecution and numbered 10, as follows (Case No. 134):

"You are further instructed that if you believe from the evidence beyond a reasonable doubt, that the defendants, or either of the defendants acting for himself and his codefendant, paid the express charges on, and receipted to the Express Company for the cocaine which the defendants are charged with having unlawfully in their possession in this action, and that the control of the Express Company over said cocaine has ceased, then said cocaine would be legally in the possession of the defendants".

39. That said Superior Court erred in not holding that said Justice's Court erred in giving the following instruction requested by the prosecution and numbered 11, as follows (Case No. 134):

"And if you further believe, from the evidence, beyond a reasonable doubt, that, after receipting for said cocaine to the Express Company and paying the charges thereon, the defendants employed one, W. I. McCoy, to transport said cocaine to any place whatever, then W. I. McCoy would be the agent of the defendants, and McCoy would only have the custody of said cocaine and the defendants would have the dominion and control over said cocaine, and said cocaine would be legally in the possession of the defendants".

40. That said Superior Court erred in not holding that said Justice's Court erred in giving the following instruction requested by the prosecution and numbered 12, as follows (Case No. 134):

"If you believe, beyond a reasonable doubt, from the evidence, that the defendants had in their possession in the County of Imperial and State of California certain cocaine, as charged in the complaint herein, and that said possession was unlawful under the laws of the State of California, then you are instructed that the fact that the defendants may have intended to export said cocaine to a foreign country, if it be a fact, would be no defense in this action".

41. That said Superior Court erred in not holding that said Justice's Court erred in giving the following instruction requested by the prosecution and numbered 13, as follows (Case No. 134):

"You are further instructed that there are no laws of the federal government which would

protect the defendants from prosecution by this State, for having cocaine unlawfully in their possession under the laws of this State".

42. That said Superior Court erred in not holding that said Justice's Court erred in refusing the following instruction requested by the defendants and numbered X, as follows (Case No. 134):

"You are instructed that if you find from the evidence that the cocaine was in transit or being transported from the United States to Mexico through a system of common carriers, then it is the law of this case that any transportation of passengers or merchandise through a state from one state to another or from the United States to a foreign country is within the exclusive jurisdiction of and legislation by Congress or by the Treasury Department of the United States".

Argument.

I.

THE RECORD IN EACH CASE DISCLOSES THAT FEDERAL QUESTIONS WERE MADE TO AND WERE CONSIDERED BY THE STATE COURT. THE STATE SUPERIOR COURT IS THE HIGHEST COURT OF THE STATE OF CALIFORNIA IN WHICH A DECISION IN THESE CASES COULD BE HAD.

The *Certificate of Judge as to Federal Question* (Rec. pp. 28-30; 133; Rec. pp. 38-40; 134) shows clearly and unmistakably that the State Superior Court not only assumed that Federal questions as to the State statute and the seizure, arrest, conviction and judgment under said statute being repugnant to the commerce and rights and immunities clauses of the Federal Constitution were in issue, but that "on the hearing before" said Court Federal questions were "claimed, contended and alleged by the said plaintiffs in error", and that said Court actually decided against said claims, contentions and allegations, and that the decision of the questions was essential to the judgment rendered.

The Record Expressly Shows Jurisdiction.

The essential portions of said *Certificate* are as follows:

> "that in said cause and on the hearing before this Court it was claimed, contended and alleged by the said plaintiffs in error, O. F. McGinis and E. E. Young, that on the 16th day of April, 1915, said O. F. McGinis and said E. E. Young were engaged in interstate and foreign commerce between the United States and the Republic of Mexico at the time when the

opium, cocaine and morphine mentioned in said action was seized and said C. F. McGinis and said E. E. Young were arrested; and

"it was further claimed, contended and alleged that said opium, cocaine and morphine so seized on the 16th day of April, 1915, was a shipment *in transitu* in interstate and foreign commerce between the United States and the Republic of Mexico; and

"it was further claimed, contended and alleged that said C. F. McGinis and said E. E. Young did not have possession of said opium, cocaine and morphine in the City of Calexico, County of Imperial, State of California, on the 16th day of April, 1915, in violation of Section 8 of the Act of the Legislature of the State of California, known as the 'Poison Law', for the reason that said C. F. McGinis and said E. E. Young were on said 16th day of April, 1915, engaged in interstate and foreign commerce between the United States and the Republic of Mexico in being the consignees of said opium, cocaine and morphine at the City of Mexicali, Northern District of Baja California, Republic of Mexico, and for the further reason that said opium, cocaine and morphine mentioned in said cause and so seized was a shipment *in transitu* in interstate and foreign commerce between the United States and the Republic of Mexico to said C. F. McGinis and said E. E. Young, as consignees, at the City of Mexicali, Northern District of Baja California, Republic of Mexico;

"*that it became and was material to the said cause for this Court to determine* whether, under said claim, contention and allegation, said C. F. McGinis and said E. E. Young were on the 16th day of April, 1915, engaged in interstate and foreign commerce between the United States and the Republic of Mexico at the time when the opium, cocaine and morphine

mentioned in said cause was seized and said C. F. McGinis and said E. E. Young were arrested; and

"whether under said claim, contention and allegation, said opium, cocaine and morphine so seized on the 16th day of April, 1915, was a shipment *in transitu* in interstate and foreign commerce between the United States and the Republic of Mexico; and

"whether under said claim, contention and allegation, said C. F. McGinis and said E. E. Young did not have possession of said opium, cocaine and morphine in the City of Calexico, County of Imperial, State of California, on the 16th day of April, 1915, in violation of Section 8 of the Act of the Legislature of the State of California, known as the 'Poison Law', for the reason that said C. F. McGinis and said E. E. Young, as it was claimed, contended and alleged, were on said 16th day of April, 1915, engaged in interstate and foreign commerce between the United States and the Republic of Mexico in being the consignees of said opium, cocaine and morphine at the City of Mexicali, Northern District of Baja California, Republic of Mexico, and for the further reason that said opium, cocaine and morphine, as it was claimed, contended and alleged, was a shipment *in transitu* in interstate and foreign commerce between the United States and the Republic of Mexico to said C. F. McGinis and said E. E. Young, as consignees, at the City of Mexicali, Northern District of Baja California, Republic of Mexico; and

"whether, under said claims, contentions and allegations aforesaid, said C. F. McGinis and said E. E. Young were entitled to have the said judgment reversed and the said cause dismissed;

"that the decision of this Court was *adverse* to the claims, contentions and allegations of said C. F. McGinis and said E. E. Young, in this: that said Court decided that said C. F. McGinis and said E. E. Young had said opium, cocaine and morphine wilfully and unlawfully in their possession on the 16th day of April, 1915, at the City of Calexico, County of Imperial, State of California, in violation of Section 8 of said 'Poison Law', and that said C. F. McGinis and said E. E. Young were not deprived of any right, immunity or privilege under the Constitution and laws of the United States, and were not entitled to have said judgment reversed and the cause dismissed." (Italics ours.)

B. The Judgment of the State Superior Court on Appeal From a Judgment Rendered in a Justice's Court is Final.

The judgment of said Justice's Court in each case is as follows:

"And it was ordered, and adjudged that said C. F. McGinis and the said E. E. Young, defendants, each pay a fine of Three Hundred Dollars and that each of said defendants be imprisoned in the County Jail in and for the said County of Imperial, State of California, for the term of sixty days and that each of said jail sentences be suspended pending good behavior of said defendant to which such fine is assessed that he be imprisoned in said County Jail for a term at the rate of one day for each one dollar of fine, not exceeding in all one hundred eighty days for each defendant." (Rec. pg. 22; 133; Rec. pg. 30; 134.)

The judgment of said Superior Court in each case is as follows:

"Order Modifying Judgment and Remanding the Action.

"The Court having heretofore taken under submission the appeal of the defendants in the above-entitled actions No. 413 and 414, respectively, and being fully informed in the premises now renders its decision. The Court orders that the appeal from the order denying the defendants' motion for new trial in each case in the Justice's Court be, and same is dismissed, that the judgment in each case be, and same is modified in this,—that the portion of said judgment reading as follows, 'and until the fine be paid by the defendant to which such fine is assessed that he be imprisoned in said County Jail for a term at the rate of one day for each one dollar of fine, not exceeding in all one hundred eighty days for each defendant,' be and the same is vacated, and set aside.

"It is further ordered that the judgment so modified in each case be, and the same is affirmed; that the actions, together with the judgments therein as modified be, and they are remanded to said Justice's Court of Calexico Township." (Rec. pg. 25; 133; Rec. pg. 33; 134.)

The State Superior Court is the highest Court of the State of California in which a decision in these cases could be had as required by Section 237 of the Judicial Code of the United States.

The proceedings on appeal from a Justice's Court to the Superior Court in the State of California are found in Chapter II, Title XI, of the Penal Code of the State of California.

It is provided as follows:

"Sec. 1466. Appeals, when allowed. Either party may appeal to the superior court of the county from a judgment of a justice's or police

court, in like cases and for like cause as appeals may be taken to the supreme court.

"Sec. 1469. If new trial granted, in what court held. If a new trial is granted upon appeal, it must be had in the superior court."

"Sec. 1470. Proceedings, if appeal is dismissed or judgment affirmed. If the appeal is dismissed or the judgment affirmed, a copy of the order of dismissal or judgment of affirmance must be remitted to the court below, which may proceed to enforce its sentence."

In the case of *Spears v. County of Modoc*, 101 Cal. Rep. 303, it was said on page 304:

"By the appeal to the superior court the enforcement of the judgment appealed from was stayed until after the determination of the appeal. (Pen. Code, sec. 1470.)",

and again on page 306:

"the judgment does not become *final* until affirmed by the appellate court." (Italics ours.)

In the opinion the Court cites the case of *Speckert v. City of Louisville*, 78 Ky. 287, where it is said:

"The effect of the appeal was to suspend the judgment, and while the judgment below is regarded as final for the purposes of an appeal, its execution cannot be enforced until the appeal is disposed of."

In the case of *People v. Bank of San Luis Obispo*, 159 Cal. Rep. 65, the portion of the opinion in the case of *Spears v. County of Modoc, supra*, first above quoted is also quoted at pages 76 and 77.

II.

THE SHIPMENT TO PLAINTIFFS IN ERROR WAS IN TRANSITU IN INTERSTATE AND FOREIGN COMMERCE.

The shipment arrived at Calexico, via Wells Fargo & Company, and was then delivered to W. L. McCoy, a customhouse broker, at Calexico, for carriage to Mexicali, Mexico. After the shipment had been delivered to said McCoy, he weighed the contents to comply with the Mexican laws and made out the American and Mexican manifest papers so as to complete the delivery to the consignees, the plaintiffs in error, at Mexicali, Mexico.

The evidence on this contention is as follows:

Testimony of Roy Jones, the inspector, (Rec. pp. 3-5; 133; Rec. pp. 7-9; 134):

"Q. On the 16th day of April what did you do?

A. Seized the package of the defendants.

Q. *Seized at Wells Fargo office?*

A. Yes.

Q. From whom did you make inquiries?

A. Mr. Beardsley and Mr. McCoy.

Q. What information did you get from Mr. Beardsley?

A. *That this package from St. Louis has been received and paid for by McGinis & Young.*

Q. Did you seize the package?

A. Yes.

Q. What did it contain when you seized it?

A. Cocaine, morphine and opium.

Q. Where is Mr. McCoy's office?

A. Mr. McCoy has a joint office with Mr. Beardsley.

Q. Who had charge of the box when you seized it?

A. I seized it in Wells Fargo office.

Q. Did Mr. McCoy say anything further to you?

A. *He said I had made out the papers so that the box could be taken over to Mexicali.*"

Testimony of Roy Beardsley (Rec. pp. 5-8; 133; Rec. pp. 3-6; 134):

"Q. What is your business?

A. Agent for Wells Fargo & Co. at Calexico.

Q. On the 16th day of April was there a package for the defendants in your office?

A. *Yes, several packages.*

Q. Was there a package or box from St. Louis, Mo.?

A. *Yes, a box from St. Louis, Mo.*

Q. Did you see Mr. McGinis or Mr. Young on that day?

A. Yes, I saw Mr. McGinis. I believe I saw both.

Q. What happened there?

A. He, I believe McGinis, paid the charges and *left the box in the office.*

Q. Have you the shipping receipt?

A. Yes."

The important parts of the shipping receipt are as follows:

"Wells Fargo & Co., Express.

"*Consignee: McGinis & Young.*

"Billing

"office

"St. Louis.

"Received the above in good order 4/16, 1915.

"McGinis & Young."

(Rec. pg. 6; 133; Rec. pg. 3; 134.)

Q. Did you see the box seized by Mr. Jones?

A. Yes.

Q. Can you state from your own knowledge what the port of destination of the box was?

A. No, the record of the original waybill is in the Chicago office.

Q. What was the destination to your best remembrance?

A. *Mexicali, Mexico, to McGinis & Young, the consignees.*

Q. After the charges were paid, who took charge of the box?

A. *Mr. McCoy, the custom broker.*

Q. Were you present when the box was seized?

A. Yes.

Q. Where was the box?

A. *In my office, it had been in the rear room.*

Q. Who removed it?

A. *I think Mr. McCoy did.*

Q. What did he do with the box?

A. *Weighed the contents.*

Q. Do you know why Mr. McCoy was weighing the box?

A. *Yes. To ascertain the weight of the contents.*

Q. Who had charge of the box?

A. *Mr. McCoy.*"

Testimony of W. L. McCoy (Rec. pp. 9-11; 133):

"Q. What is your business?

A. *Customhouse broker.*

Q. Where is your office?

A. In the same building with Wells Fargo & Co.

Q. Do you know the defendants McGinis & Young?

A. Yes, sir.

Q. Did you have on the 16th day of April, 1915, a package *consigned to McGinis & Young*?

A. Yes sir, they directed me to take charge of it. *The arrangements had been made several days before.*

Q. Have you the shipping receipt?

A. Yes sir; it was in an envelope tacked on the box."

The important parts of the shipping receipt are as follows:

"Invoice of Goods for Export to Mexico,
"Shipped on Consignment Without Sale
"by Exporter.

"Place and Date: *St. Louis, Mo., 1915.* Invoice "of J. S. Merrill.

"Consigned by ____ ____ Do. of St. Louis; to "McGinis & Young of Mexicali, Mex. to be "shipped per Wells Fargo & Co. Express."

"Q. Were you present when Mr. Jones seized the box?

A. Yes sir.

Q. What conversation did you have with Mr. Jones concerning the box?

A. Mr. Jones handed me his card and asked me if I had a package consigned to McGinis & Young, and I stated to him that I had.

Q. Who had control of the box at the time of the seizure?

A. *I suppose I had control of it. I was making arrangements to take it across to Mexicali, Mexico, to McGinis & Young, the consignees;* I was acting as their agent for them.

Q. Do you know who removed the box from the rear room?

A. Yes, I did.

Q. What did you then do with the box?

A. I opened the box and *weighed the contents,* and Mr. Young helped me.

Q. What was the purpose of your weighing the contents?

A. *Under the Mexican law as to certain kinds of goods the exact weight must be shown on the Mexican papers.*

Q. What papers had you made out?

A. *Both the American and Mexican papers for the exportation of this box to McGinis & Young, the consignees, at Mexicali, Mexico.*

Q. *Did you hold yourself out to the public as a common carrier?*

A. *Yes.*"

Testimony of W. L. McCoy (Rec. pp. 15-17; 134):

"Q. What is your business?

A. *Customhouse broker.*

Q. *Do you hold yourself out to the public as a transporter of goods to Mexico?*

A. *Yes.*

Q. Who had control of the box at the time of seizure by Mr. Jones?

A. *I did after Wells Fargo turned it over to me at my office and I had made out bills.*

Q. Who was it consigned to?

A. *Consigned to McGinis & Young.*

Q. To whom was it billed?

A. *To McGinis & Young, Mexicali, Mexico.*"

Testimony of E. E. Young (Rec. pp. 13-14; 133):

"Q. Were you in the office of Wells Fargo & Co. on the 16th day of April, 1915?

A. Yes sir.

Q. How did you happen to go there?

A. *I went to pay the Wells Fargo charges on a consignment of goods from St. Louis, Mo., to McGinis & Young at Mexicali, Mexico.*

Q. Who did you pay the charges to?

A. To Mr. Beardsley.

Q. *Did you remove the box?*

A. *No sir.*

Q. *Did you have possession of the box on the 16th day of April, 1915?*

A. *No sir.*

Q. Do you know what was done with the box?

A. *Arrangements were made with Mr. McCoy to have the box taken to Mexicali, Mexico.*

Q. Do you know what Mr. McCoy did with the box?

A. *He weighed the contents.*"

From the foregoing it clearly and unmistakably appears that the commodities in question were received by Wells, Fargo Co. in the course of its business for transportation to Mexico and that it had carried them to Calexico so that the shipment to the foreign consignees could be continued. The customhouse broker was in the act of continuing the shipment when the seizure by the State was made. He had done all that was required both by the laws of the United States and by the Republic of Mexico as to preparing a commodity at the international line for exportation to a foreign country.

While in his hands the goods were *in transitu* in interstate and foreign commerce.

III.

WELLS FARGO & CO. WAS THE INITIAL CARRIER OF THE SHIPMENT THAT WAS SEIZED. WELLS, FARGO & CO. HAS NO OFFICE IN MEXICALI, MEXICO. WHEN GOODS ARE RECEIVED ADDRESSED TO A CONSIGNEE AT MEXICALI, THE CONSIGNEE IS NOTIFIED AT CALEXICO AND THERE THE GOODS ARE RECEIPTED FOR.

It cannot be disputed that Wells Fargo & Company is a common carrier of goods, and, from the foregoing evidence, that it had brought the shipment that was seized in the hands of the customhouse broker to Calexico. Wells Fargo & Company was the initial carrier of said shipment. As it has no office in Mexicali, and as it is impossible for it to continue the shipment to Mexicali, it is the custom to notify the consignee of goods consigned to Mexicali at Calexico, where the consignee receipts for the same.

The evidence on this contention is as follows:

Testimony of Roy Beardsley (Rec. pg. 8; 133; Rec. pp. 3-6; 134):

"Q. Has Wells Fargo & Co. an office in Mexicali?

A. No.

Q. Did they ever have one?

A. No.

Q. Is it impossible for Wells Fargo & Co. to deliver to Mexico?

A. *It is impossible to deliver in Mexico.*

Q. *When goods are received addressed to a consignee in Mexicali, what do you do?*

A. Notify them.

Q. *Notify them at Calexico?*

A. Yes.

POOR COPY

Q. When a shipment is received by Wells Fargo addressed to consignees at Mexicali to whom do you deliver it?

A. *To the consignees at my office at Calexico.*

Q. The purpose of notifying the consignee, where shipment is made to Mexicali, is for the reason that the Wells Fargo line ends at Calexico, and you make delivery to consignee at Calexico because Wells Fargo ends in Calexico?

A. Yes."

There is nothing extraordinary that a shipment must go through the hands of a connecting carrier.

The fact that Wells, Fargo Co. demands a receipt for the shipment at the terminus of its line while the commodity is *in transitu* in interstate and foreign commeree does not cause the shipment to become State property.

Each carrier is entitled to be released at the end of its line before it allows the goods to be taken from it by the next carrier.

The facts show that this shipment was *in transitu* to foreign consignees in the ordinary course of business with all requirements being demanded and complied with.

IV.

W. L. McCOY, THE CUSTOMHOUSE BROKER, WAS A COMMON CARRIER OF GOODS FROM THE UNITED STATES TO MEXICO. HE WAS THE CONNECTING CARRIER OF THIS SHIPMENT.

In the cases at bar the customhouse broker was the connecting carrier of the shipment.

A common carrier is defined in the Century Dictionary and Cyc., Vol. 1, as follows:

> "One who for hire undertakes the conveyance of goods or persons. One who *holds himself out as a carrier,* inviting the employment of the *public generally,* is a common carrier." (Italics ours.)

A customhouse broker is defined in the Treasury Decisions, Vol. 24, page 145, as follows:

> "The term 'customhouse broker' shall be taken to include all persons, firms, co-partnerships, corporations, associations, or joint-stock associations transacting customs business at a customhouse in behalf of other *persons generally.*" (Italics ours.)

Mr. McCoy, the customhouse broker, testified as follows:

> "Q. Did you *hold yourself out to the public* as a common carrier?
> A. Yes." (Rec. pg. 11; 133.)
> "Q. Do you *hold yourself out to the public* as a transporter of goods to Mexico?
> A. Yes." (Rec. pg. 15; 134.)

After the Wells Fargo & Co.'s charges on the shipment that was seized were paid, it was turned over to the customhouse broker.

Mr. McCoy testified as follows:

"Q. Who had control of the box at the time of the seizure by Mr. Jones?

A. I did after *Wells Fargo turned it over to me at my office* and I had made out bills." (Rec. pg. 15; 134.)

Mr. Beardsley, the Wells Fargo agent, testified as follows:

"Q. After the charges were paid, who took charge of the box?

A. Mr. McCoy, the custom broker." (Rec. pg. 7; 133.)

Mr. McCoy, at the time of the seizure, was about to continue the carriage of said shipment to the consignees in Mexico. He testified as follows:

"Yes, sir, they directed me to take charge of it. The arrangements had been made several days before." (Rec. pg. 9; 133.)

"I suppose I had control of it. I was making arrangements to take it across to Mexicali, Mexico, to McGinis & Young, the consignees; I was acting as their agent for them." (Rec. pg. 10; 133.)

The record that was before the State Court showed by the affidavit of D. B. Potts (Rec. pg. 29; 134) that on top of the box that was seized was painted the following:

"McGinnis & Young c/o W. I. McCoy, Custom Broker, Mexicali, Mexico via Calexico."

The records in both cases show that Mr. McCoy was the connecting carrier, and also that everyone handling the shipment that was seized considered him as the connecting carrier. Wells Fargo & Co.

knew that there was to be a connecting carrier as the shipment was billed to "Mexicali, Mexico," beyond their line. The markings on the box showed "c/o W. I. McCoy, Custom Broker, Mexicali, Mexico via Calexico."

It was held in the case of *Fairchild v. Pacific Coast S. S. Co.*, (Cal. App.) 84 Pac. 438, in the following language:

> "The statement in the bill of lading that the consignee was at Nome notified the defendant that the merchandise was not to be delivered to him at Seattle and that it was to be delivered to a connecting carrier."

The syllabus in that case is as follows:

> "Markings on Packages of freight held a sufficient designation of the connecting carrier to which goods were to be delivered. The bills of lading for merchandise showed that delivery was to be made at Nome, *beyond the initial carriers line*, held notice to such carrier that goods were to be delivered to a connecting carrier." (Italics ours.)

The Wells Fargo agent testified as follows:

> "Q. What was the destination to your best remembrance?
>
> A. Mexicali, Mexico to McGinis & Young, the consignees." (Rec. pg. 7; 133.)

Before the shipment was turned over to the customhouse broker, it was necessary for the consignees to pay the freight charges to the express company in order to have the shipment released from the lien for the charges, as at that point the Wells Fargo line ends at Calexico.

The Wells Fargo agent testified as follows:

"Wells Fargo & Co. is not responsible *after the charges are paid,* and so far as the express company was concerned McGinis & Young could have taken the box away at any time *the box was receipted for.*" (Rec. pg. 3; 134.)

"Q. After the charges were paid and the receipt returned to you, who took charge of the box?

A. Mr. McCoy, a custom broker." (Rec. pg. 7; 133; Rec. pg. 4; 134.)

V.

THE SHIPMENT WAS SEIZED IN THE HANDS OF A COMMON CARRIER ENGAGED IN INTERSTATE AND FOREIGN COMMERCE. THE SEIZURE WAS AN UNLAWFUL INTERFERENCE BY THE STATE. THE CALIFORNIA POISON LAW IS REPUGNANT TO THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

The following parts of the record in each case clearly and unmistakably show that at the time of the seizure of this shipment the plaintiffs in error were in Mexico:

Testimony of Roy Jones (Rec. pp. 4-5; 133):

"Q. Did you arrest the defendants on that day?

A. Yes.

Q. Where did you arrest Mr. Young?

A. In the Wells Fargo office.

Q. How long after seizing the goods did you arrest Mr. Young?

A. About one-half hour.

Q. How did you arrest Mr. McGinis?

A. Mr. Young sent a messenger for Mr. McGinis.

Q. When Mr. McGinis came did you arrest him?

A. Yes.

Q. How long after you arrested Mr. Young did you arrest Mr. McGinis?

A. About one-half hour, as near as I can remember.

Q. What did you say to Mr. Young about Dr. McGinis?

A. I told him that I wanted to arrest Dr. McGinis.

Q. Were you present when he sent the messenger for Dr. McGinis?

A. Yes.

Q. Was Mr. Young there when the box was seized?
A. No.
Q. Did you know where he was?
A. I believe he was over in *Mexicali.*"

Testimony of C. F. McGinis (Rec. pg. 11; 134):

"Q. What is your business?
A. Physician and surgeon.
Q. Where is your office?
A. Mexicali, Mexico.
Q. Where were you on the 16th day of April prior to the seizure of the box by Jones?
A. In *Mexicali, Mexico.*
Q. Were you arrested by Jones on the 16th day of April?
A. Yes, sir.
Q. Where were you arrested?
A. In Mr. McCoy's office here in Calexico.
Q. How did you happen to call there?
A. Mr. Young sent for me to come over.
Q. Did you have possession of the opium, cocaine and morphine contained in the box that was seized on the 16th day of April?
A. No."

It cannot be disputed from all the testimony quoted from each record that, at the time of the seizure, the shipment was in the hands and possession of the customhouse broker for the purpose of continuing, as a common carrier, the shipment to Mexico, and that it was not in the possession of the plaintiffs in error.

The cases at bar present the situation of consignees in the Republic of Mexico being summoned from that foreign country to submit to arrest for the alleged violation of a law of one of the States of

the Union. Such a proceeding is very high handed to say the least, especially when they are arrested for *"wilfully and unlawfully"*; having *"in their possession"* the shipment complained of. (Italics ours.)

The records disclose that nearly all the evidence already quoted and relied upon in this brief was adduced on direct and cross-examination in the prosecution's case in chief in each case.

The law (Deering 1915 Penal Code of California, pg. 805) under which the plaintiffs in error were arrested, tried, convicted and sentenced is in conflict with the Constitution of the United States and is wholly void.

The commodity had started as an article of trade from the United States to a foreign consignee. At the time of the seizure its transportation had not ended.

The State law referred to does not exempt "common carriers engaged in transporting such drugs" from its operation, as did Congress, with commendable caution, in enacting the proviso in Sec. 8 of the Act approved December 17, 1914, relating to the production, importation, manufacture, * * * of opium * * *. This provision is as follows:

> "Sec. 8. * * * *Provided*, That this section shall not apply to any * * *, or to *common carriers engaged in transporting such drugs*: * * *." (Latter italics ours.)

It is a coincidence that the section of the State law complained of is also numbered "8," and in

that very section the Act of Congress referred to is recognized for it provides:

> "that all such wholesale jobbers, wholesalers and manufacturers in this section mentioned shall keep * * * the written orders or blanks required to be preserved under the provisions of section two of the act of congress, approved December 17, 1914, * * *."

It is most important and highly imperative, in order to sustain a State law, that the State use greater caution in framing its laws so as not to infringe upon Federal matters. A State law, directly or indirectly, expressly or by implication, cannot infringe upon shipments or traffic in interstate and foreign commerce.

As was aptly said by Mr. Justice Matthews in the case of *Bowman v. Chicago,* 125 U. S. Sup. Ct. Rep. 465, that

> "the rule has been asserted with great clearness that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admitting of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. Cooley v. Board of Wardens, 53 U. S. Sup. Ct. Rep., 12 How. 299 (13:996); Crandell v. Nevada, 73 U. S. Sup. Ct. Rep., 6 Wall. 42 (18:746). Surely transportation of passengers or merchandise through a state, or from one state to another, is of this nature. It is of national importance that there shall be but one regulative power."

That said State law, so far as it is sought to apply it to the plaintiffs in error, is an attempt to

regulate commerce between the States and a foreign country, and is in conflict with the commerce clause of the Federal Constitution.

The very Act of Congress already referred to provides for exemptions. In Sec. 2 of that Act we find the following:

> "Sec. 2 * * *. Nothing contained in this section shall apply— * * *
>
> (c) To the sale, *exportation, shipment or delivery* of any of the aforesaid drugs by any person within the United States or * * * *to any person in any foreign country,* * * *." (Italics ours.)

The power to regulate interstate commerce being vested in Congress, it is within the power of Congress to permit its exercise in whole or in part by the States. But this State power when it is given by congressional action can only affect merchandise *when it has been "mingled with the common mass of property in the State".*

This rule is stated by Chief Justice Fuller, in *Leisy v. Hardin,* 135 U. S. 100, 124, 125; 10 Sup. Ct. Rep. 681:

> "Under our decision in *Bowman v. Railway Co., infra,* they had the right to import this beer into that state, and, in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation

and sale by the foreign or non-resident importer."

The cases at bar are farther removed and therefore stronger than the example given in last portion of the above opinion. We have foreign consignees, while awaiting a shipment from the United States to them in Mexico, called over from Mexico to be arrested after the shipment *in transitu* to them in Mexico had been seized.

In another passage of the same opinion the Chief Justice said:

> "The responsibility is upon congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

The opinion again said the imported article "is not within the jurisdiction of the police power of the State unless placed there by congressional action."

In the case of *In re Van Vliet*, 43 Fed. Rep. 762, which we also cite as enunciating the rules we contend for, Mr. Justice Caldwell quotes the above passages from the Chief Justice's opinion.

Only in the cases where Congress has granted a prohibitory power to a State and where also the merchandise has "mingled with the common mass of property within the State"—that is, where the

shipment is not in interstate or foreign commerce and where the transit has terminated—can the police power of the State act.

The case of *Ex parte Jervey*, 66 Fed. Rep. 961, holds to the rule here contended for. The facts of that case show *common carriers actually* engaged in interstate commerce arrested, with the *transportation, in interstate commerce,* of the goods seized *not terminated,* while in the cases at bar we have foreign consignees called from the foreign country and arrested, with the *transportation, in interstate and foreign* commerce, of the goods seized *not terminated.*

To quote from the opinion in that case at pages 961 and 962:

> "The liquors must first be introduced into the state before these laws can operate. It is upon their arrival within the state—that is, when the *transit terminates* (In re Van Vliet, 43 Fed. 761)—that the police power can act; and up to and until that time the police power cannot act (In re Lanford, 57 Fed. 570)." (Italics ours.)
>
> "Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The Daniel Ball, 10 Wall. 557."
>
> "The law of interstate commerce affects every citizen of the United States. Its protection and its penalties weigh equally on all. It is also not disputed that, immediately on reaching the wharf, they were arrested and detained in custody by the city police, and afterwards held under the warrant produced here;

that they did not land their cargo or any part of it; and that, when they were arrested, *it was afloat. The transportation was not ended.* They were *actually engaged* when arrested *in interstate commerce.* Their detention by the police was unlawful, and the warrant by which they were incarcerated is based on a provision of law in conflict with the constitution and law of the United States. It is wholly void." (Italics ours.)

In the case of *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, this Court held that:

"The statute of the state of Iowa, forbidding, under penalty, common carriers, their agents, or any person, to bring liquor into the state unless previously furnished with a certificate from the county auditor that the consignee was authorized to sell the same, was void as a regulation of interstate commerce."

It will be noted that the State Act complained of does not exempt from its provisions "sales at *wholesale* by jobbers, wholesalers and manufacturers to pharmacies" in a sister State or in a foreign country or to any person in a sister State or in a foreign country, for its exemptions in regard to certain sales is:

"provided, that the above provisions shall not apply to sales at wholesale by jobbers, wholesalers and manufacturers to pharmacies, as defined in section one of an act entitled 'An act to regulate the practice of pharmacy in the *State of California* and to provide a penalty * * *,' approved March 20, 1905, and acts amendatory thereof; or physicians, nor to each other, nor to the sale at retail in pharmacies by pharmacists to physicians, dentists or veterin-

ary surgeons *duly licensed to practice in this state.*" (Italics ours.)

Nor does it exempt sales at *retail* in pharmacies by pharmacists to physicians, dentists or veterinary surgeons in a sister State or in a foreign country.

"Pharmacies" are defined in section one of the Act referred to in the above quotation as:

> "Every store or shop where drugs, medicines or chemicals are dispensed or sold at retail or displayed for sale at retail, or where prescriptions are compounded, which has upon it or in it as a sign, the words 'pharmacist,' 'pharmaceutical chemist,' 'apothecary,' 'druggist,' 'pharmacy,' 'drug store,' 'drugs' or any of these words, or the characteristic show-bottles or globes, either colored or filled with colored liquids, shall be deemed a 'pharmacy' within the meaning of this act."

The vice of the Act complained of, in so far as it is sought to be applied by the State to the interstate and foreign shipment and to the foreign consignees in the cases at bar, lies in the fact that in making the provisos of exemption of the referred to classes from the operation of the Act it goes just so far, but does not go far enough, and in the fact that in going just so far it is intended to directly cover such shipments or sales and the persons connected with such shipments or sales as in the cases at bar, as is shown by the seizure of the shipment, by the arrest of the foreign consignees, and by the rulings of the State Superior Court on the Federal questions presented to it.

VI.

THE RIGHTS AND IMMUNITIES OF THE PLAINTIFFS IN ERROR WERE FLAGRANTLY VIOLATED BY THE SEIZURE OF THE SHIPMENT WHILE IN TRANSITU IN INTERSTATE AND FOREIGN COMMERCE, BY THEIR ARREST, TRIAL, CONVICTION AND SENTENCE, AND BY THE DENIAL OF THEIR CLAIMS.

The cases at bar present a flagrant and illegal violation on the part of the State in applying the law complained of to this shimpent *in transitu* in interstate and foreign commerce, and in the possession of the customhouse broker who had weighed the contents to comply with the Mexican law and who had made out the American and Mexican manifest papers preparatory to continuing the transportation of the commodity to the consignees in Mexico, and who at the time of seizure was actually "engaged in the transportation of such drugs."

As far as the State was concerned, the subject matter of the shipment was still *in transitu*. Its "transportation was not ended." In this regard the cases at bar are similar to the case of *Ex parte Jervey, supra*, where the commodity was still *in transitu*, or, in the language of that learned judge, "afloat."

It was not State property. It had not "become mingled in the common mass of property within the State." Until it had and "up to that point of time" and "in the absence of congressional permission" to act upon it, "the State had no power to interfere by *seizure*, or any other action, in the

prohibition" of the interstate and foreign shipment. (Italics ours.) Here we quote from the learned opinion of Chief Justice Fuller in the case of *Leisy v. Hardin, supra.* How apt are his words to the present situation.

"The State had no power to interfere by seizure" in the present cases. It was unlawful and a violation of the rights and immunities of plaintiffs in error, as the foreign consignees of the shipment *in transitu* in interstate and foreign commerce.

As far as the State was concerned, the "exportation, shipment or delivery of" the "drugs" in question was within the express exemption of sub-section (c) of Section 2 of the Act of Congress heretofore quoted, and the possession of the "drugs" by the customhouse broker "engaged in transporting such drugs" was within the express exemption of Section 8 of the same Act of Congress.

Here was a violation on the part of the State that cannot be justified under the facts of the cases.

It has even been held that the "violation of a right implied out of" the Constitution and laws of the United States "would be a violation of them."

In re Fitton, 45 Fed. Rep. 474.

See also:

Kentucky v. Dennison, 24 How. 66;

Ex parte Reggel, 114 U. S. 642; 5 Sup. Ct. Rep. 1148.

This being a shipment without the realm of State cognizance, the arrest, trial, conviction and sentence

of the plaintiffs in error by the State was a violation of the rights and immunities that the plaintiffs in error had as foreign consignees. It was a flagrant and illegal violation on the part of the State in applying its law to an interstate and foreign shipment and to foreign consignees. Such application made it repugnant to the Federal Constitution.

> "They were actually engaged when arrested in interstate" and foreign commerce. "Their detention was unlawful, and the warrant by which they were incarcerated is based on a provision of law in conflict with the constitution and law of the United States. It is wholly void."
>
> *Ex parte Jervey, supra.*

The conviction and sentence in each case is wholly void.

The claims and contentions in this portion of the brief were fully "claimed, contended and alleged by the plaintiffs in error" in the State Superior Court, but these claims and contentions were denied by said Court. Here was another violation of the rights and immunities of the plaintiffs in error under the Constitution and laws of the United States. Such a denial was a denial of substantial rights and was reversible error.

VII.

THE FOREGOING FEDERAL QUESTIONS WERE PRESENTED BY THE PLAINTIFFS IN ERROR BY REQUESTING CERTAIN INSTRUCTIONS BE GIVEN TO THE JURY. THESE INSTRUCTIONS THE COURT REFUSED TO GIVE.

In these cases the plaintiffs in error requested the trial Court to give certain instructions directly touching upon the Federal questions contended for. These instructions are set out *totidems verbis* in the foregoing specifications of error numbered 21 to 27, inclusive, and 42, and taken together, set forth the law as laid down in the decisions already quoted from. They embody the contentions and claims of the plaintiffs in error arising under the two clauses of the Federal Constitution. The trial Court refused to give these instructions. This refusal was affirmed.

The State Superior Court should have held that these instructions contained the law as applicable to these cases, and should have reversed the convictions and dismissed the cases upon the undisputed facts showing a shipment *in transitu* in interstate and foreign commerce, either because the statute was repugnant to the Federal Constitution in the particulars pointed out, or, if the statute could be upheld, because the statute could not be applied to these cases.

The rules contended for are also set out in:

Cooley v. Portwardens, 53 U. S. Sup. Ct. Rep.; 12 How. 299;

Crandell v. Nevada, 73 U. S. Sup. Ct. Rep.; 6 Wall. 745.

VIII.

CERTAIN INSTRUCTIONS REQUESTED BY THE STATE AND GIVEN BY THE TRIAL COURT AND APPROVED BY THE STATE SUPERIOR COURT ON APPEAL SHOW THE CONSTRUCTION PLACED UPON THE STATUTE BY THE STATE. THIS CONSTRUCTION MAKES THE STATUTE REPUGNANT TO THE FEDERAL CONSTITUTION.

Certain instructions requested by the prosecution and given by the trial Court and approved by the appellate Court were specified as error by plaintiffs in error both in the trial Court and argued on appeal. These instructions are set forth *totidems verbis* in the foregoing assignments of error numbered 31 to 41, inclusive, and may be consolidated together as showing a denial of the claims and contentions of the plaintiffs in error.

These instructions show that this statute was intended to operate upon such a shipment and its foreign consignees, regardless of the fact that it was *in transitu* in interstate and foreign commerce, or regardless of the fact that plaintiffs in error had Federal rights as foreign consignees, as the very case of the State showed conclusively the nature of the shipment.

As these instructions stand they cut out entirely the defense of a shipment *in transitu* in interstate and foreign commerce, or a consideration at all by the jury of the law that should be applied to the facts as presented by the State itself.

It will be noted by these instructions that, if the plaintiffs in error were not shown to fall within any

of the exemptions of the statute, irrespective of the fact that they were foreign consignees and that the shipment was one under Federal cognizance, the law was meant to apply in such cases.

One instance of the repugnancy of the Act is shown by instruction number 1 (Specification No. 31), which tells the jury that "The State * * * has limited the possession of cocaine to certain classes of persons * * *." These "classes of persons" are the only ones exempted from the operation of the Act.

All these instructions could have had no other effect then to have instructed the jury that the statute applied in these cases and that the possession of the drugs by a "common carrier engaged in transporting such drugs" in interstate and foreign commerce was a wilful and unlawful possession of such drugs in the State of California by the foreign consignees.

It is obvious that the statute, as pointed out in these instructions, was intended to apply to shipments other than those made within and limited to the confines of the State by the exempted classes.

IX.

IN CASE NO. 134, THE JURY REQUESTED CERTAIN INSTRUCTIONS TOUCHING UPON A PHASE OF THE CASE CONTENDED FOR BY PLAINTIFFS IN ERROR, BUT THE TRIAL COURT REFUSED THEM. THIS REFUSAL WAS AFFIRMED.

The jury in Case No. 134 requested two simple instructions as set out in the foregoing assignments of error numbered 29 and 30 and reading, respectively, as follows:

> "We desire that the Court instruct us as to the definition of a common carrier."
>
> "We desire that the Court instruct us as to the definition of a customhouse broker."

To the position taken by the State in these cases, how opposed is the force of these two requests coming from the jury!

If the State had not intended to make this statute apply to cases of this nature, such instructions were not objectionable under the facts of the case.

From the two instructions, it is obvious that the jury desired to consider the claims and contentions of the plaintiffs in error, but the refusal to give them again exemplified the vice of the statute.

It cannot be questioned but that the very wording of the statute leaves no room for doubt.

Certain persons are exempted, all others must be included. In this regard the statute is repugnant to the Federal constitution as applying to shipments as in the cases at bar.

X.

THE STATE SUPERIOR COURT SHOULD HAVE HELD THE STATUTE REPUGNANT TO THE FEDERAL CONSTITUTION AS AN INTENDED REGULATION OF COMMERCE AND AN INTENDED INTERFERENCE WITH RIGHTS AND IMMUNITIES. IF NOT, IT SHOULD HAVE, NEVERTHELESS, HELD THAT THE PLAINTIFFS IN ERROR, BEING FOREIGN CONSIGNEES OF A SHIPMENT IN TRANSITU IN INTERSTATE AND FOREIGN COMMERCE, WERE NOT WITHIN THE SCOPE OF THE ACT, AND THEREFORE SHOULD HAVE DISMISSED THE CASES.

It is manifest, starting with the seizure of this shipment to the affirmance of the judgments on appeal, that the State intended that this statute should apply to shipments of drugs coming from without her borders and passing through her territory in transit either to a sister State or to a foreign country.

These drugs are a lawful article of *foreign commerce* and so recognized by the exemption contained in paragraph (c) of Section 2 of the Act of Congress heretofore quoted, and also a lawful article of *interstate commerce* in the possession of "common carriers engaged in transporting such drugs" by the proviso contained in Section 8 of the same Act of Congress.

A statute applied to a shipment as we have in these cases should have been held unconstitutional by the State Superior Court.

Construing the statute as constitutional, the State Court should then have decided that the plaintiffs

in error, as foreign consignees, had a right *exclusively* under Federal control to receive the shipment from the United States through the State of California, and should then have reversed the judgments and dismissed the cases.

So far the Federal government has by congressional action given to the States of the Union prohibitory powers in two instances: over alcoholic liquors and over explosives.

To this extent the States have a right to prohibit shipments of liquors and explosives into State territory. That is as far as congress has legislated.

As to any other commodity, a statute interfering with their transportation in interstate and foreign commerce would be a regulation asserted without warrant from congress and therefore void as a regulation of commerce.

XI.

IF THE STATUTE CAN BE UPHELD, NEVERTHELESS, THE JUDGMENTS MUST BE REVERSED AND THE CASES DISMISSED, BECAUSE THE SHIPMENT, BEING IN TRANSITU IN INTERSTATE AND FOREIGN COMMERCE, THE FOREIGN CONSIGNEES WERE NOT AMENABLE TO THE STATUTE NOR THE GOODS LIABLE TO SEIZURE.

In regard to the shipment being one exclusively of Federal cognizance what we have already said is deemed sufficient. It follows then that the judgments denied the plaintiffs in error certain rights that they had under the Constitution and laws of the United States; therefore the judgments should be set aside and the cases dismissed.

This conclusion should inevitably follow, even if this Court should find that the statute was not unconstitutional on the grounds urged.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the judgments be reversed and the cases dismissed.

Dated, San Francisco,
March 6, 1918.

WILLIAM SEA, JR.,
FREDERICK S. TYLER,
Attorneys for Plaintiffs in Error.

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1917

C. F. McGINIS and E. E. YOUNG,
Plaintiffs in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.
No. 133

C. F. McGINIS and E. E. YOUNG,
Plaintiffs in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.
No. 134

In Error to the Superior Court of Imperial County, State of California.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

FACTS.

We cannot accept the statement of facts as set forth in the Brief of the Plaintiffs in Error. By

this we do not mean to impute any deliberate intention on their part to misstate the facts, but it appears to us that there is (on their part) an entire misconception of the essential facts constituting the crime alleged in the complaint.

The statement of Plaintiffs in Error on page 3 is in part as follows:

> "This shipment consigned to plaintiffs in error, "arrived at Calexico, State of California, via "Wells, Fargo & Company, and was then put "into the hands of W. L. McCoy, a customhouse "broker, duly licensed by the United States "and the Republic of Mexico, for the purpose "of continuing the shipment to the plaintiffs "in error, the consignees, in the Republic of "Mexico."

The most important chain of facts in the whole category of facts is left out of this statement, to wit: that prior to the shipment being put into the hands of McCoy (who is alleged to be a customhouse broker) the shipment had been received at Calexico, in the State of California, by Wells, Fargo & Co., and its agent at Calexico had notified Young and McGinis of its arrival. Pursuant to notice, *Young and McGinis* on the day alleged in the complaint, called at the office of Wells, Fargo & Co., in Calexico, paid the charges on the shipment, took the consignment of drugs into their OWN possession, and gave Wells, Fargo & Co., their receipt therefor, and from that moment, according to the testimony of Wells, Fargo & Co.'s agent, the express company ceased to have any further dominion or control over the same. It was AFTER

Young and McGinis had so taken possession of the drugs that they were passed into the hands of McCoy, if indeed McCoy can be said to have had same at any time in his own possession to the exclusion of that of Young and McGinis.

The following excerpt from the testimony conclusively shows that these vital and determining facts should be included in the Statement of Facts.

Mr. Beardsley, the Wells, Fargo & Co., agent at Calexico, testified in part:

"Q. Did you see Mr. McGinis or Mr. Young
" on that day?
"A. Yes, I saw Mr. McGinis; I believe I
" saw both.
"Q. What happened there?
"A. He, I believe Mr. McGinis paid the
" charges and left the box at the office.
"Q. Were Wells, Fargo & Co., responsible
" to McGinis & Young after the charges were
" paid and the box receipted for?
"A. Wells, Fargo & Co., is not responsible
" after the charges are paid, and so far as the
" express company was concerned McGinis &
" Young could have taken the box away at any
" time the box was receipted for.
"Q. Have you the shipping receipt?
"A. Yes. (Hands shipping receipt to Mr.
" Leighton.)
"Mr. SEA. We have no objection to the
" shipping receipt.
"Mr. Leighton reads as follows:

"Wells Fargo & Co., Express.

"Consignees: McGinis & Young.
"Address:
"O. H. No—Article Bx. 960.00 Val. Date 4/12/1915

"Clerk's No.	W. B. No.	Date.	Billing office	C. O. D.	Weight.	Total Col.	paid in part
"2	40	4/7	St. Louis		72	6.96	

"Name of Shipper_____ Address_____
"O. H. from Sheet,____ Why O. H.
"Notice of Consignee,____ Shipper,____ Billing
"Office,_____
"Claim Dept._____
"How disposed of_____ 191__
"By__, Received the above in good order 4/16. 1915.
"Identified by_____
"(Signed) McGinis & Young."

Case 134, Transcript, pp. 3-4.

Again, on redirect examination, Mr. Beardsley testified:

"Q. To whom did you make delivery of the package* from St. Louis, Mo.?
"A. To McGinis & Young."

Case 134, Transcript, p. 6.

Furthermore, the statement of facts found in the Brief of Plaintiffs in Error neglects to incorporate the very important fact that *185 ounces* of cocaine were repacked by Mr. McCoy and Young, whereas only *100 ounces* were received in the original box from St. Louis, which it is claimed was still *in transitu*, and which it is now claimed by Plaintiffs in Error was put in the hands of McCoy as part of a continuous shipment;—85 ounces having been added between the time of receipt thereof by McGinis & Young and the taking over thereof by McCoy, i. e. during the time McGinis and Young had the drugs in their possession, and this added 85 ounces were testified to by Mr. McCoy as having been given to him by Young. This is clearly shown by the testimony of McCoy

*The package referred to is the package containing the drugs in question.

himself to be found on pages 16 and 17 of the transcript of Case No. 134.

Mr. McCoy, being examined as a witness, testified:

"Q. How many bottles of cocaine in the "package?

"A. 185 bottles of cocaine, 115 of morphine, "one package of opium.

"Q. How many bottles in the box besides "what came from St. Louis, Mo.?

"Mr. Sea. I object on the ground that there "were no evidence that he had added to it.

"Court. Objection overruled.

"A. Three or four other packages were put "into the box when repacked.

"Q. How many oz. of cocaine in original "box from St. Louis?

"A. 100 oz. in the original package from "St. Louis.

"Q. How many when repacked?

"A. 185 oz. when repacked.

"Q. Were the other packages turned over "to you by Mr. Young?

"A. Yes.

"Q. Who did you help unpack the box?

"Mr. Sea. I object on the ground that there "was no evidence that he had helped anyone.

"Court. Sustained.

"Q. Who unpacked the box?

"A. Mr. Young and myself.

"Q. During the time that the box was there, "if McGinis and Young had said that it was "their box, could they have gotten it from you?

"Mr. Sea. Objected to on the same ground "and as leading.

"Court. Sustained.

"Q. Whose box was it while in your pos-"session?

"Mr. Sea. Objected to on the same ground.

"Court. Sustained.

"Q. To whom was it billed?

"A. To McGinis and Young, Mexicali, "Mexico.

"Q. From whom did you get it?

"A. I got it from Mr. Young.

"Q. Were you acting as agent for McGinis "and Young?

"A. Yes.

"Q. When in your office was the box sub- "ject to their control?

"A. Yes.

"Q. Could they remove it from your office?

"A. Yes. I was acting as agent for McGinis "and Young."

Again (Transcript, Case No. 133, p. 11) Mr. McCoy testified in part as follows:

"Q. Did McGinis and Young have dominion "and control over the box while you had charge "of it?

"A. Yes, sir, they could have taken it away "from my office with its contents and done "anything they pleased with them."

Plaintiff in Error and Defendant E. E. Young testified:

"Q. Were you in the office of Wells, Fargo "& Co., on the 16th day of April, 1915?

"A. Yes, sir.

"Q. How did you happen to go there?

"A. I went to pay the Wells Fargo charges "on a consignment of goods from St. Louis, "Mo., to McGinis and Young at Mexicali, "Mexico.

"Q. Whom did you pay the charges to?

"A. To Mr. Beardsley.

"Q. Did you remove the box?

"A. No, sir."

Transcript, Case No. 133, p. 13.

There is no explanation attempted of the possession of the 85 oz. of cocaine which was added to the box when repacked, but more of this question hereafter.

It should be noted that Mr. McCoy's office was in the same room as Wells, Fargo & Co.

There is no attempt to show by competent evidence that W. L. McCoy was a custom-house broker, and even no attempt made to show, or even claim, that he was duly licensed or at all, by the United States and the Republic of Mexico, or by either of them.

The very important fact is also left out of the statement of facts of Plaintiffs in Error, that irrespective of the question in whose possession these narcotic drugs were at the time of the seizure, and irrespective of what it was intended then, or thereafter, to do with them, *these drugs had been in the undisputed and unqualified possession of the defendants earlier in the day,* and whatever journey they may have been on, interstate, foreign or otherwise, that journey had been suddenly brought to a complete halt *by them,* and the whole chain broken by the act of the consignees themselves when they stopped the goods *in transitu* at Calexico, paid the charges thereon, gave their receipt for the same, and *took possession* thereof. Also that some additional cocaine, not in the original shipment at all, was, on the day alleged in the complaint, in the possession of defendants. The possession of one being the possession of both, it being

borne in mind that it was admitted and nowhere attempted to be denied, that they were partners and both were familiar with what was being done, and neither attempted, even on the trial, to repudiate the act of the other.

Furthermore, it is not necessary, under the complaint, for the drugs to be in the possession of defendants at the time of their arrest, provided they were, at *sometime* during the day alleged in the complaint in their possession. Disposing of them, even, would not absolve them from the consequences of having had them in their possession.

Mr. McCoy testified:

"Q. Did you testify that you had custody of the box for McGinis and Young?

"A. Yes.

"Q. Who was it consigned to?

"A. Consigned to McGinis and Young.

"Q. Are the defendants partners?

"Mr. SEA. Objected to as not proper cross-examination.

"COURT. You may answer.

"Q. Do you know if they are partners or not?

"A. They are doing business as partners, I think.

"Q. Was the package turned over to you by McGinis and Young?

"A. Mr. Young turned the package over to me."

Transcript, Case No. 134, p. 16.

Also a little later, the same witness (McCoy) testified:

"Q. Who unpacked the box?

"A. Mr. Young and myself.

"Q. During the time that the box was there, "if McGinis and Young had said that it was "their box, could they have gotten it from you?

"Mr. SEA. Objected to on the same ground "and as leading.

"COURT. Sustained.

"Q. Whose box was it while in your pos- "session?

"Mr. SEA. Objected to on the same ground.

"COURT. Sustained.

"Q. To whom was it billed?

"A. McGinis and Young, Mexicali, Mexico.

"Q. From whom did you get it?

"A. I got it from Mr. Young."

Transcript, Case No. 134, p. 17.

"Q. Did McGinis and Young order a ship- "ment of cocaine, morphine and opium from "J. S. Merrill & Co., of St. Louis, Mo.?

"A. Yes, sir.

"Q. The goods mentioned in the shipping "receipt marked 'People's Exhibit C'?

"A. Yes, sir."

Transcript, Case No. 133, p. 11.

The commingling above referred to of the 100 ounces of cocaine with the 85 ounces given to McCoy by Young was an act which ended the inter-state commerce feature of the shipment (if there ever was any), and made it a *new shipment of 185 ounces of cocaine from Calexico to Mexicali*, and our contention, which we will elaborate, is that Plaintiffs in Error were prohibited from having these drugs in their possession in the State of California, whether for the purpose of inaugurating a new shipment in foreign commerce, or for any other purpose.

If by any process of reasoning the narcotics can be said to have been at the time of their seizure in interstate or foreign commerce, it was not because of their having been shipped from St. Louis to Mexico via Calexico, because whatever may have been the original intent in that regard, that action was stopped by the consignees themselves in taking possession, dominion and control of the shipment. It could only be on the theory that McCoy was a common carrier, and a new shipment had commenced with McCoy as the common carrier running between Calexico and Mexicali. This cannot avail defendant much, nor give them any comfort, as *they could not initiate a new shipment without having possession,* and that is the crime under the California statute.

Clearly then, at the time of the seizure the offense had been already committed and finished and complete, and the question was not whether or not at the time of the seizure the defendants had the narcotics in their possession, (for that would have been immaterial under either view of the case), but the question was whether or not on the day alleged in the complaint they had possession.

If the statement of facts as we have outlined them, is correct (and every fact set forth by us is taken from the record and states fairly the record when fairly considered) whatever in the record in any way attempts to contradict the facts herein set out, are but the assertions of the defendants

themselves by way of general denials and in most instances were merely conclusions of the witnesses themselves.

Not a single one of the facts as we have above set them out is specially denied in a specific denial of any one fact, or attempted to be specially denied, and they all stand as unquestioned facts in these cases.

The Evidence Is No Longer Open for Construction. The Verdict of the Jury Has Taken From the Court the Power to Pass Upon the Weight or Effect of the Evidence.

EFFECT OF THE VERDICT OF GUILTY.

The Penal Code of California,

§ 1441, Penal Code,

provides that the verdict must in all cases be general. This latter section refers to trials in Justices' Courts. A general verdict of guilty is a determination of all the issues of fact submitted to the jury for its decision.

People v. Stokes, 5 Cal. App. 205.

The issue, so far as the prosecution were concerned, has been clearly defined, and that is "did the defendants, on the day mentioned, have these drugs in their possession or under their control?" The issue has been determined by the verdict, and, as a determination, is final.

The prosecution is not required to prove that the defense of Plaintiffs in Error is incorrect; in

other words, they are not required to negative the fact that these drugs were rightfully in the possession of defendants. The crime is complete upon the proving of the one element, to wit: that they were in the possession of the Plaintiffs in Error.

> "In criminal cases, the prosecution is required "to prove only two things: (a) that a crime "has been committed, and: (b) that it was "committed by the person charged."
>
> *People v. Jones*, 31 Cal. 565.

Any other issues raised by the plea of not guilty, are defenses, and defendants must sustain the burden.

WHAT WAS THE ISSUE RAISED BY THE PLEA OF NOT GUILTY?

The plea of "not guilty" interposed in this case put in issue "every material allegation of the indictment or information".

After the proof of a *prima facie* case by the prosecution, defendants were entitled to introduce evidence tending to show their defense.

> "All matters of fact tending to establish a "defense * * * may be given in evidence "under the plea of not guilty."
>
> § 1020, Penal Code State of California.

This is not shifting the burden of proof of any "material allegation of the information" to the defendants, but clearly throws upon them the burden of proving their defense.

> "The plea of not guilty puts in issue every "material allegation of the indictment or infor-

"mation. And all matters of fact tending to "establish a defense * * * may be proved "under a plea of the general issue."

People v. Ah Lee, 60 Cal. 86;

People v. Aleck, 61 Cal. 137;

Ex parte Hornef, 154 Cal. 355.

This being so, we then may sum up the salient features of the case and show the elements of the crime summarized as follows:

(a) On April 16th, 1915, Plaintiffs in Error took possession of the package of narcotics from Wells, Fargo & Co., at Calexico, in the State of California;

(b) With the assistance of McCoy, they opened the package, commingled therewith 85 ounces of cocaine which they then had in their possession and repacked the box;

(c) The State Poison Law, under the terms of which they were convicted, makes one element alone sufficient to complete the crime, to wit: possession.

These facts, all shown by the evidence, complete the crime, unless the contentions of Plaintiffs in Error shall be allowed to prevail. These contentions are:

(1) That the shipment was *in transitu;*

(2) That there is a conflict between the State Act and the Harrison Act, and that therefore the State Act must fall;

(3) That the State Act is repugnant to the Federal Constitution, as being an attempt to regulate interstate or foreign commerce.

PLAINTIFFS IN ERROR WERE NOT ENGAGED IN INTERSTATE OR FOREIGN COMMERCE.

It will be noted that Plaintiffs in Error claim to have been engaged in interstate or foreign commerce *when they were arrested and the shipment was seized.*

We do not concede this for any purpose whatever, but even if this should be held to be true, the crime was not a continuing one, but was complete the moment they took possession, without taking into consideration what they were doing with the drugs at the time of *seizure* (which time was subsequent to their taking of possession). They had possession, and if they subsequently engage in interstate or foreign commerce with the drugs, the crime was already complete, and it therefore became immaterial what they were doing with the drugs at the time of seizure and arrest.

The complaint, which is in this respect identical in both cases, upon which the warrant of arrest was based, which said warrant was served at the time of seizure, upon its face shows that the commission of the offense had been completed prior to the issuing or drawing of the complaint, the issuing of the warrant, and the arrest itself, the arrest and seizure being identical as to time. That portion of the complaint applicable to the point here made is as follows:

> "That E. E. Young and C. F. McGinis of
> " Calexico, California, on the 16th day of April,
> " 1915, and *before the filing of this complaint*
> " at Calexico, California, in the said County of

" Imperial, State of California, did wilfully and
" unlawfully have in their possession * * *"
Transcript, Case 133, p. 3;
Transcript, Case 134, p. 2.

SO-CALLED COMMERCE ACTIVITIES OF PLAINTIFFS IN ERROR, BUT A SUBTERFUGE TO BRING THEMSELVES WITHIN THE INTERSTATE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

Plaintiffs in Error, from the facts as they appear, have considered themselves as being engaged in interstate commerce, but can there be any question but what this claim is but a subterfuge to enable them to evade the clearly exercised police power of the State? They have never attempted to show for what purpose they were in possession of these drugs, nor have they attempted to bring themselves within any provision of law entitling them to have possession of the drugs. The entire transaction must be a *bona fide* one and the usual methods of interstate shipment must not be departed from for the purpose of evading the police laws of the State.

Cook v. Marshall Co., 196 U. S. 261; 49 L. ed. 471;

Austin v. Tennessee, 179 U. S. 343; 45 L. ed. 224;

Robbins v. Sheehy, 120 U. S. 489; 30 L. ed. 694;

Bowman v. Chicago, 125 U. S. 465; 31 L. ed. 700.

Neither the State Act nor the Harrison Act (concerning which we will say more hereinafter) gives to these Plaintiffs in Error any right to have these drugs in their possession. The Harrison Act, as we shall show, prohibits *certain persons* from having them in their possession without registration and paying a special tax, and the State Act absolutely prohibits all persons from having it in their possession at any time for *any* purpose, except specified druggists, pharmacists, etc., within which classification even Plaintiffs in Error do not claim to come.

At *some* time during the day in question, and *prior to the seizure and arrest,* Plaintiffs in Error had these drugs in their possession. By virtue of which Act do they claim to have the right to have these drugs?

The State Act provides (Section 8):

> "It shall be unlawful for any person * * * "to * * * have in his possession any "cocaine, opium * * * except upon the writ- "ten order or prescription of a physician "* * *."

Plaintiffs in Error have made no contention that they come within the purview of this Act insofar as being entitled under the terms of § 8 to have these drugs.

THE SHIPMENT WAS NOT IN TRANSITU.

Plaintiffs in Error make another contention: That the shipment was *in transitu* at the time of

their taking possession, or as they state it, at the time of "seizure and arrest".

The evidence does not bear out this statement in any particular. The evidence shows, as we have pointed out in the statement of facts, that the shipment had arrived at Calexico via Wells, Fargo & Co. Express. That it was delivered to Plaintiffs in Error, and they paid the freight charges and gave a receipt for the package. *They* then delivered it to McCoy to ship to Mexico. But that is not *all* they did. They had the package repacked. Does this import that they were continuing the *same* shipment through from St. Louis (where it originated) to Mexico? The shipment ended when it was delivered to Plaintiffs in Error at Calexico, in the State of California.

Aside from the question whether or not the 100 ounces were intended for shipment to Mexico, how have Plaintiffs in Error accounted for the possession of the other 85 ounces which they added to the shipment? If it were not for the importance of the other questions involved, which are clearly the lifeblood of the statute, it would be sufficient to rest the entire question on the possession of the other 85 ounces, and this Court may refuse to consider anything further because of the fact that the admitted possession of 85 ounces of itself is the crime charged, and these 85 ounces were not concerned in the so-called interstate shipment. But, passing for the moment the possession of this additional drug, the shipment had been stopped

in transitu by Plaintiffs in Error, and the original package broken, other drugs added, and a new method of shipment substitued from that originally started, that is to say: via McCoy instead of via Wells, Fargo & Co. Who is McCoy that his possession (given him by Plaintiffs in Error) should be sufficient to protect them from the consequences of their act of possession?! Plaintiffs in Error call him a "custom-house broker", and also a "common carrier". We will show hereafter that he was not a custom-house broker in so far as this shipment is concerned, for taking actual possession, repacking and reshipping are not part of the duties of a custom-house broker. At all events McCoy was not acting as a custom-house broker in this transaction, regardless of what the fact may be as to his qualifications as such.

THERE IS NO CONFLICT BETWEEN THE STATE ACT AND THE HARRISON ACT.

The Harrison Act (Act of Dec. 17, 1914, Ch. 1 Fed. Stats. Annot. 1916 Supp. p. 101) provides:

Section 1. EVERY PERSON WHO PRODUCES, IMPORTS, MANUFACTURES, COMPOUNDS, DEALS IN, DISPENSES, SELLS, DISTRIBUTES OR GIVES AWAY any opium, etc., shall REGISTER * * * and shall PAY A TAX.

It further provides that it shall be unlawful for any person REQUIRED TO REGISTER under the terms of the Act to produce or import, etc., without having registered and paid the tax.

Section 2 provides that it shall be unlawful for any person to sell, etc., except in pursuance of a written order of the person to whom it is sold, on a form to be issued by the Commissioner of Internal Revenue.

Section 2 further provides that nothing contained in that section shall apply to the sale, exportation, shipment or delivery by any person within the United States or the District of Columbia or any of the insular possessions of the United States to any person in any foreign country. (This provision is erroneously quoted on page 43 of the Brief of the Plaintiffs in Error wherein they so quote it as to have it appear that the drugs might be shipped from one state to a person in another state.)

Section 4 provides that it shall be unlawful for any person who has not registered and paid the tax to send, ship, carry or deliver any drugs from any state to any person in any other state; provided that this section shall not apply to common carriers engaged in transporting the drugs.

Section 8 of the Harrison Act provides that it shall be unlawful for any person not registered and who has not paid the tax provided, to have in his possession any of the drugs specified, and further provides that such possession or control shall be presumptive evidence of a violation of the Act.

Plaintiffs in Error have not claimed to come within the provisions of any section of the Harrison Act, nor do they claim to be permitted by

this latter Act to have these drugs in their possession.

Just what is their stand? They claim that the State Act would cover their case, and that they would be guilty under the State Act, except for the one fact alone contended for by them, and that is that the State Act is unconstitutional because it is in conflict

(a) With the Harrison Act and particularly § 8 thereof;

(b) With the Constitution of the United States, which has given to the Federal Government the power to regulate commerce between the States and with foreign nations.

The State Act (§ 8) provides that it shall be unlawful for *any person* * * * to sell, furnish or give away or offer or HAVE IN HIS POSSESSION any opium, etc.

Sec. 8 of the Harrison Act is the Section referred to in the Brief as being in conflict with the State Act. Sec. 8, however, is not a statement of the acts constituting the offense, but is a RULE OF EVIDENCE only. It provides that it shall be unlawful for any person NOT REGISTERED to have in his possession any of the drugs mentioned and that SUCH POSSESSION OR CONTROL SHALL BE PRESUMPTIVE EVIDENCE OF A VIOLATION OF THIS SECTION. Sec. 8 further provides that common carriers engaged in transporting the drugs shall be exempted from the provisions thereof, and then proceeds:

PROVIDED FURTHER: That it shall not be necessary to negative any of the foregoing exemptions in any complaint * * * and the burden of proof of such exemption shall be upon the DEFENDANT.

Section 8 of the Harrison Act was construed in

United States v. Brown, 224 Fed. 135,

in which case a demurrer was filed to the indictment wherein it was contended:

(a) That Sec. 8 was unconstitutional as an attempt to encroach upon the police power of the several states; and

(b) That the only right Congress has to regulate the sale of any commodity, within the provisions of the Constitution, is to regulate commerce and the right of taxation for Federal purposes, and that neither of these rights is invoked by Sec. 8.

The Court says:

"The purpose of the drug act is expressed "in its title: (quoting the title, showing it to "be an act to provide REGISTRATION and to pro- "vide for a TAX) * * * I think we may "assume, and that the Court will take judicial "notice of the fact, that no opium is grown or "produced in this country, and that the pur- "pose of the act is to prohibit the importation "of opium. * * * Sec. 1 of the Act pro- "vides: (here follows section 1, showing that "it is to provide registration and a tax). Sec- "tion 2 provides a lawful and legal method of "acquisition by any person ENTITLED TO HAVE "POSSESSION OF THESE DRUGS. Section 8 pro- "vides: (Here follows the whole of Section 8, "which for the sake of brevity we will omit, "as it is set forth herein elsewhere.) the pur- "pose of Congress being to prohibit the impor-

"tation, manufacture or sale of the drugs "described; and by this act the drug became "an outlaw in the country, its presence Con- "gress has the right to trace, and has the "power to punish any person in whose posses- "sion this "outlaw" article may be found. The "possession of such drug or control thereof is "made PRESUMPTIVE EVIDENCE of the unlawful "importation, manufacture, etc., as well as an "obligation to pay the special tax provided by "the act, and a failure to register and pay the "tax as provided in Sec. 1 would be a fraud "upon the United States, in that it deprived "the government of the revenues provided "by the act. In United States v. Stowell, "133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555, "the Court say:

"'By the now settled doctrine of this court "* * * statutes to prevent frauds upon "the revenue are considered as enacted for "the public good and to suppress a public "wrong, and therefore, although they im- "pose penalties or forfeitures, not to be con- "strued, like penal laws generally, strictly "in favor of the defendant, but they are to "be fairly and reasonably construed, so as "to carry out the intention of the legislature.'

"Congress, having the power to exclude the "drug entirely from the United States, and "the right to regulate its relation to interstate "commerce, and to levy a tax, must be held to "have the right to make it unlawful for any "person WHO HAS NOT COMPLIED WITH THE PRO- "VISIONS OF THE ACT BY REGISTRATION OR PAYING "THE TAX, to have in his possession this 'out- "lawed' article. The act must be construed as "a whole, and force given to every part when "this can be done."

The Court here overruled the demurrer.

Again, in the case of

United States v. Woods, 224 Fed. 278,

the Court expressly recognizes the difference between those persons who are enumerated in Sec. 1 of the Harrison Act and users of the drug, holding that the Act refers *only to the persons named in Sec. 1*, and that possession of the drugs by users or others, provided they are not those named in Sec. 1, shall not be construed as a violation of the Act. The Court says:

"The indictments charged that defendants
" * * * had in their possession and under
" their control * * * smoking opium * * *
" not theretofore having registered * * *
" as required under the provisions of the act
" * * * and not having theretofore paid the
" special tax provided for by the act. * * *

"In the instant cases * * * defendants
" maintain (1) that mere consumers of the
" drug and in possession of the same for their
" own consumption are not by the act required
" to register and pay the tax, and (2) that the
" indictments do not show that defendants are
" of *any of the classes required by the act to*
" *register and pay the tax.* * * *

"Having in mind that taxes can be imposed
" and statutory offenses created only by direct,
" clear and apt language, it seems clear that
" there is nothing in the act imposing the duty
" of registering and payment of taxes upon
" mere consumers of the drugs. *They are not*
" *within section 1, and section 8 does not pur-*
" *port to extend the registration and taxation*
" *features of the act to them, or to any one,*
" but only to make unlawful mere possession
" of the drugs *by any person of the classes by*

"*section 1 required to register and pay,* and "who have not, and to create a statutory *rule* "*of evidence.*

"And this latter has misled the prosecution "to believe that the essentials of the offense "need not be set out in the indictments, but "only this *rule of evidence*—the possession of "the drugs, from which in some cases the "offense may be inferred; that is, *in the cases* "*of those by section 1 required to register and* "*pay the tax.* Whenever an offense can be "committed by *only certain classes of persons,* "the indictment must expressly allege that "accused is of those classes or it is fatally "defective in substance * * *

"The demurrers are sustained, the indict- "ments dismissed, and defendants discharged."

It seems from the foregoing that prosecution of the defendants in the cases at bar could not, under the circumstances alleged in the information, and under the facts shown, have been had under the Harrison Act. There is no showing, or contention, that they are producers, importers, manufacturers, compounders, dealers, dispensers, sellers, distributors, or in any manner enumerated in section 1 of the Harrison Act. They are charged simply with having it in their possession. This being so, their conviction under a State Act, which undoubtedly is valid if there is no conflict, cannot be made the basis of an attack upon the State Act because of conflict between this State Act and the Harrison Act. There is no more conflict between the State Act and the Harrison Act, than there is between the State Act and some counterfeiting Act, or any

other Act dealing with subjects foreign to the matters covered by the State Act.

The fact that a person might be convicted under the provisions of the State Act for "having in their possession" these drugs, and still not be liable under the Harrison Act, was more strongly brought to light in the case of

United States v. Wilson, 225 Fed. 82,

in which case the defendant admitted having an opium pipe and opium in her possession, testifying she was addicted to the use of the drug and had secured it from another person for her own use. Defendant was indicted for a violation of *section 8* of the act, "having the drug in her possession" and was convicted upon that one count alone. The Court says:

> "It was admitted at the trial that the defend-
> "ant had at her house, in her possession and
> "under her control, an opium pipe and an
> "outfit necessary for smoking purposes, includ-
> "ing a small quantity of opium prepared for
> "the pipe, at the time charged in the indict-
> "ment. * * * This evidence was uncon-
> "tradicted, and presents the question WHETHER
> "IT IS AN OFFENSE UNDER THE ACT FOR A PERSON
> "TO HAVE IN HIS POSSESSION ANY OF THE DRUGS
> "NAMED IN THE ACT, FOR PERSONAL USE. If it
> "is an offense, Congress has not in terms so
> "declared, and it must be worked out by a
> "construction of the language of the act. * * *
> "The first clause of section 1 declares who
> "SHALL REGISTER AND PAY THE SPECIAL TAX.
> "They are those who produce, import, manu-
> "facture, compound, deal in, dispense, sell, dis-
> "tribute, or give away the drugs mentioned.
> "The second clause of Section 1 declares it to

"be unlawful for any person REQUIRED TO REG-
"ISTER by the first clause of section 1, to do
"any of the things named therein without hav-
"ing registered and paid the special tax pro-
"vided in the section.

"The question now arises, to whom does the
"clause 'any person not registered under the
"provisions of this act and who has not paid
"the special tax' in the eighth section refer?
"Clearly, it refers to, and at least includes,
"those doing the things specifically named in
"the first section. Does it refer to and in-
"clude others doing things *not* specifically
"named in the act, viz., those having IN
"THEIR POSSESSION OR UNDER THEIR CONTROL
"the drugs named for their personal consump-
"tion? It seems to me to so hold would be
"for the court to enlarge the list of those
"whom Congress required to register and pay
"the special tax. * * * If Congress had
"intended to require persons to register who
"had in their possession or under thir con-
"trol drugs for any purpose *other than that*
"*stated in the act*, it would seem that it would
"have been a simple matter to have said so. It
"is clear to my mind that the language quoted
"from the eighth section, when read in con-
"nection with the first section of the act,
"refers ONLY TO THOSE MENTIONED IN THE LAST
"NAMED SECTION, and however desirable it may
"be to have that list enlarged, the court is
"without authority to do it.

"It is, in my judgment, the purpose of sec-
"tion 8 to make the MERE POSSESSION * * *
"by any of those *specified in the first section*
"prequmptive evidence that such parties had
"not registered nor paid the special tax as
"required therein, and that it was not intended
"to enlarge the class that is required to reg-
"ister and pay the tax under the first section
"* * * The section (8) establishes a *rule*

"*of evidence*, in that, upon the government "proving that a defendant was doing any of "those things mentioned in section 1, clause "1, of the act, and further that a narcotic "was found in his possession, he would be "presumptively guilty of violating the first "section of the act; then the burden of proof "shifts, and is upon the defendant to show "affirmatively that he is not one of the class "mentioned in section 1, required to register, "or, if so, that he had registered and paid the "special tax." (New trial granted.)

Again the Harrison Act was construed in

United States v. Jin Fuey Moy, 225 Fed. 1003,

in which case defendant was indicted for conspiring to violate the Act and the indictment was quashed. The indictment charged defendant with conspiring with one Martin by giving to Martin a prescription for drugs, in order to have "in the possession of Martin" the drugs called for by the prescription. The Court says:

"The unlawful act charged against the de- "fendant, is not the improper or unlawful dis- "pensing of a drug, whether in good or bad "faith, but consists in HAVING IN THE POSSES- "SION AND UNDER THE CONTROL of Martin cer- "tain drugs. The indictment, therefore, can- "not be sustained, unless the having in the "possession and under the control of Martin "of certain drugs is an unlawful thing and a "violation of the act of Congress.

"In reading the eighth section in connection "with the remaining sections of the act of "Congress, when it provides that it shall be "unlawful for any person not registered under

"the provisions of this act to have in his pos-
"session certain drugs, I think that the word
"'person' should be held to refer to the per-
"sons with whom the act of Congress is deal-
"ing; that is, the PERSONS WHO ARE REQUIRED
"TO REGISTER and pay the special tax in order
"to import, produce, manufacture, deal in, dis-
"pense, sell or distribute. And there is no alle-
"gation in the indictment that Martin had in
"his possession these drugs for any of these
"purposes.

"The indictment, therefore, could not be sus-
"tained unless the MERE FACT OF HAVING THE
"DRUG IN HIS POSSESSION is a violation of the
"law. If so, any person would be presump-
"tively guilty and subject to indictment, and
"have the burden of proof cast upon him
"under this section, if he had any small
"amount of the prescribed drug in his pos-
"session, without any reference to the pur-
"pose for which it was to be used, whether
"legitimate or otherwise. On account of the
"view which the court entertains as to the
"scope of the act of Congress, the motion to
"quash the indictment is sustained."

Section 8 of the Harrison Act, therefore, not being applicable to this case, defendants cannot claim a conflict making the State Act unconstitutional, as the Harrison Act does not affect them, even though there was a conflict.

"In all criminal prosecutions, the accused, to
"entitle him to raise the constitutionality of a
"statute, must show that his rights are affected
"by it, and when this is done, he will be allowed
"to question only such provisions of the statute
"as apply to his own rights as distinguished
"from other rights. * * *"

12 Corpus Juris, 766.

How are these defendants affected by the Harrison Act? If defendants were charged with failing to register under a State Act (or rather, if the State Act required registration and defendants were charged with a violation of that portion of the Act), they might then show a conflict between the State Act and the Federal Act, but they are here charged with an act *not recognised or covered by the Harrison Act.*

There is another distinction to be drawn between the Harrison Act and the State Act; the former being drawn with a view to exercising the *taxing* power of the government, and the latter being purely *police power.* There is no revenue to be derived by the exercise of the State Act, other than fines, which are merely incidental thereto, making the act purely police power.

"Police power must be distinguished from
"the taxing power, and the distinction is this:
"The taxing power is exercised for the *purpose*
"*of raising revenue* and is subject to certain
"limitations * * * while the police power
"is exercised only for the *purpose of promot-*
"*ing the public welfare,* and, although this end
"may be attained by taxing and licensing occu-
"pations, yet the object must always be regu-
"lation and not the raising of revenue, and
"hence the restrictions on the taxing power
"do not apply. Accordingly, where the object
"is regulation and not revenue, there is an
"exercising of the police rather than the tax-
"ing power where a license is required as a
"prerequisite to entering in certain lines of
"business * * *".

13 Corpus Juris, p. 906, § 414.

"The police power extends to the protection
" of the lives, health, comfort, and quiet of all
" persons, and the protection of all property
" within the state. * * * The mere fact
" that a law restrains the liberty of citizens of
" the state or the liberty of citizens of the
" United States, does not render it unconsti-
" tutional."

12 Corpus Juris, p. 909.

"Under the American constitutional system,
" the police power, being an attribute of sov-
" ereignty inherent in the original states, and
" *not delegated by the Federal constitution to*
" *the United States*, remains with the indi-
" vidual states. Within the states, Congress
" may exercise no police power as such, and
" may affect it only by the enactment of stat-
" utes within the powers conferred on it by
" the constitution of the U. S., either expressly
" or by clear implication."

12 Corpus Juris, p. 910, § 417.

(This latter clause refers to the powers conferred by the Constitution giving the Federal Government power over the regulation of commerce, etc.)

"Admitting that the subject to which the
" statute relates is within the scope of legis-
" lative power, the test of validity within the
" police power is whether or not the regula-
" tions prescribed are reasonable, and the test
" of reasonableness is whether the attempted
" regulation makes efficient, constitutional guar-
" anties, and conserves rights, or is destructive
" of inherent rights. * * * IN APPLYING THIS
" TEST, IT MUST BE REMEMBERED THAT THE PRE-
" SUMPTION IS IN FAVOR OF THE REASONABLENESS
" AND VALIDITY OF THE LAW."

12 Corpus Juris, p. 934.

What is unreasonable in the State law as an exercise of the police power? We shall show herein that there is nothing unreasonable and that this very question has been passed upon in this state by our Supreme Court and never overruled.

PLAINTIFFS IN ERROR WERE NOT ENGAGED IN INTERSTATE COMMERCE OR COMMERCE WITH FOREIGN NATIONS AT THE TIME THEY WERE IN POSSESSION OF THE DRUGS.

Even if the contention of Plaintiffs in Error should be true that the State Act cannot interfere with commerce, and is therefore in conflict with the Constitution of the United States, there is no showing whatever, either in the evidence or by the ingenious argument of counsel, that they were engaged in interstate commerce or in commerce with a foreign nation at the time they were in possession of the drugs. We have already discussed the proposition that there is a difference in time between the moment when the crime was committed, and the moment when the seizure was made and the arrest made, and we now come to the proposition that Plaintiffs in Error at no time were engaged in such commerce as is to be regulated solely by the Federal Government.

McCOY WAS NOT A COMMON CARRIER.

McCoy has been referred to repeatedly by Plaintiffs in Error as "common carrier." On page 39

of their brief, they have the caption reading: "The shipment was seized in the hands of a common carrier engaged in interstate and foreign commerce." This is a bald conclusion. Again, on page 35, they say: "W. L. McCoy, the custom-house broker, was a common carrier of goods from the United States to Mexico. He was the connecting carrier of this shipment." Again a conclusion. But Plaintiffs in Error on this same page (35) then proceed to attempt to show that McCoy was a common carrier. In the first place, they have not even shown that he was a custom-house broker. He says he was, but the facts have not shown it. In the first place, he was not a licensed custom-house broker, or the record is silent, and the burden of proving this being on the Plaintiffs in Error, their failure to show it can be taken most strongly against them. In the absence of a license, McCoy was prohibited from acting as a custom-house broker by the Act of Congress next cited.

A custom-house broker has been defined by Congress:

(Act of Oct. 22, 1914. Ch. 331, Sec. 3—Subdivision Fifth. Federal Statutes Annotated. 1916 Supplement p. 86.)

"Every person, firm or company whose occupation it is, as the agent of others, to arrange entries and other custom-house papers, or transact business at any port of entry relating to the importation or exportation of goods, wares or merchandise, shall be regarded as a custom-house broker,"

and this very Act provides for the payment of a license. Where is the proof of this license?

Failure to prove any fact, where the burden has been cast, is to be construed most strongly against the party upon whose shoulders has been cast the burden.

GENERAL RULES OF EVIDENCE THE SAME IN BOTH CRIMINAL AND CIVIL CASES.

The general rules of evidence have been held to be the same in criminal as well as civil cases.

People v. Murphy, 45 Cal. 137.

The fact of possession, contrary to the State Act having been shown, Plaintiffs in Error were entitled, in their defense, to show the legality of that possession. One of the elements they claim to constitute a defense, is that the drugs were in process of interstate or foreign commerce, and they point to the fact that McCoy was a duly licensed custom-house broker as a link in the chain of such commerce. The burden thus cast upon them of proving this fact, was not sustained and their failure to introduce any testimony whatever on this point must be construed most strongly against them.

A list of presumptions, to be found in

§ 1963 Code of Civil Procedure of State of California,

contains the following, in subdivision 5 thereof:

"That evidence willfully suppressed would "be adverse if produced."

It has been held that this section is applicable to a criminal case in the State of California, in the case of

People v. Lee Chuck, 78 Cal. 335,

wherein the Court says:

> "The rule is, that where a party to an issue "on trial has proof in his power, which, if "produced, would render material, but doubt- "ful, facts certain, the law presumes against "him, if he omits to produce that proof, and "authorizes a jury to resolve all doubts ad- "versely to his defense."

There can be no doubt but that the proof that a license had or had not been issued to McCoy, was available to Plaintiffs in Error, and to state this fact is sufficient. Therefore, their failure to produce this proof should have been, and undoubtedly was, resolved against them by the jury, and this Court cannot do otherwise than hold that there being no proof that McCoy was a custom-house broker, therefore he was *not* such.

Even at that, the mere fact of being a custom-house broker is not of itself sufficient to make McCoy a common carrier.

Common carriers have been defined as every one who offers to the public to carry persons, property or messages and he is a common carrier only of those things which he thus offers to the public to carry. It is necessary not only that he should offer to carry, but he must be engaged in the business of actually carrying.

CUSTOM HOUSE BROKER IS NOT A COMMON CARRIER.

The Public Utilities Act of California gives to the Railroad Commission exclusive control over common carriers. The Act enumerates who are common carriers within the purview of the Act, and does not include custom-house brokers.

A common carrier is defined to be

> "Every one who offers to the public to carry "persons, property, or messages, excepting only "telegraphic messages, is a common carrier of "whatever he thus offers to carry."
>
> § 2168 Civil Code of California.

> "One who undertakes for hire or reward, "to transport the goods of such as choose to "employ him from place to place."
>
> 6 Cyc. 365.

> "A common carrier differs from a private "carrier in two important respects: (1) in "respect of duty, he being obliged by law to "undertake the charge of transporting, which "no other person, without a special agree-"ment, is. (2) In respect of risk * * *
>
> 6 Cyc. 364 (B).

Where is the evidence as to McCoy's character as a common carrier? We quote from the brief of Plaintiffs in Error (p. 35):

> "Q. Did you hold yourself out to the public "as a common carrier?
> "A. Yes.
> "Q. Do you hold yourself out to the public "as a transporter of goods to Mexico?
> "A. Yes."

Does this *make* him a common carrier? Of course, it is necessary that he should hold himself out as such to make him a common carrier, but that alone is not sufficient. Counsel in asking this question of McCoy, should have asked another, which we might suggest:

"Q. Do you *transport* goods to Mexico?"

That might have completed the chain, or at least have furnished one of the elements of making a common carrier. But to our mind, under the definitions above, he must go further and show not only that he actually transports goods in general, but that he has held out to the public and has actually transported these particular classes of goods. Holding out alone is not sufficient, unless the person holding out as such is a common carrier. What the various definitions of common carrier provide, so far as holding out to the public is concerned, is this: A common carrier, or rather one who carries goods, is not a common carrier unless he HOLDS HIMSELF OUT AS SUCH TO THE PUBLIC. Two things at least are necessary: (a) That he must be a carrier, and (b) that he must hold himself out as such to the public. What is the situation with regard to McCoy? Simply that he held himself out as a common carrier. That at best is but his conclusion; no attempt is made to produce the facts upon which the conclusion is based.

IF McCOY WAS ENGAGED BY PLAINTIFFS IN ERROR TO TRANSPORT THESE DRUGS, HE WAS A MERE FORWARDER OR AGENT OF PLAINTIFFS IN ERROR, AND NOT A COMMON CARRIER.

McCoy says he was the agent of Plaintiffs in Error and does not even claim that he was acting in any capacity as either a custom-house broker or as a common carrier, whatever may be the fact of his qualifications in either capacity.

> "A mere forwarding agent who does not re-
> "ceive goods into his custody, but, as agent
> "for the shipper, merely contracts for their
> "transportation by carriers, and who has no
> "interest in the freight, but receives compensa-
> "tion from the shipper as his agent, is not a
> "common carrier, and is liable only for want
> "of care."
>
> *10 Corpus Juris*, p. 50.

> "A person who receives and forwards goods
> "* * * but who has no concern in the
> "vessels etc., by which they are transported,
> "and no interest in the freight, though he may
> "receive compensation for his services, is not
> "a common carrier."
>
> *Story on Bailment*, § 502.

EVEN IF THE STATE ACT SHOULD BE HELD TO BE A VIOLATION OF, OR IN CONFLICT WITH THE CONSTITUTION WHICH GIVES TO THE CONGRESS THE POWER TO REGULATE COMMERCE, IT IS VALID IF CONGRESS HAS NOT LEGISLATED UPON THE SUBJECT, AND MUST STAND UNTIL CONGRESS HAS EXERCISED THE GRANT OF POWER.

Legislative enactments of States passed under police powers with relation to the health, morals,

peace and safety of their people, but which, by their necessary operation, affect to some extent the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce, and are to be respected in the courts of the Union UNTIL THEY ARE SUPERSEDED AND DISPLACED BY SOME ACT OF CONGRESS.

In the case of

Hennington v. Georgia, 163 U. S. 317; 41 L. ed. 174,

a statute was passed prohibiting the running of trains on Sunday. The Court in construing this statute, and particularly with reference to the question that the statute was unconstitutional as interfering with interstate commerce when trains running THROUGH the state were concerned, held that while the statute did, to a certain extent, limit the power of Congress to regulate commerce, yet, being within the valid police power of the State, the law should be upheld. This case was a DIRECT ATTEMPT TO REGULATE COMMERCE, and not like the case at bar, only incidentally affecting commerce, and yet the Supreme Court held that the law was constitutional. Another matter decided by the Court was that in the case cited, Congress had not legislated upon the running of trains on Sundays, and in that case the State had a right to do so until Congress had exercised its right granted by the States to so act.

Furthermore, there surely can be no claim on the part of the Plaintiffs in Error that they are engaged in innocuous commerce. This is not a case of dealing between the States in some ordinary article of commerce. They are dealing with an "outlaw", something under the ban of the law, and so declared by this Court. Drugs, unquestionably are detrimental to health, morals, peace and safety of the people, and as such must be regulated under the police power of the State. No person, under any circumstances, can claim the rights conferred or protected under the Constitution, to violate any of the rights of others in a State, likewise protected and conferred by the same Constitution. As was said in

Missouri &c. R. Co. v. Haber, 169 U. S. 626; 42 L. ed. 883

and afterwards reiterated in

Reid v. Colorado, 187 U. S. 137; 47 L. ed. 108

"Neither corporations nor individuals are "entitled, by force alone of the Constitution "of the United States * * * to bring into "one State from another State cattle liable "to impart or capable of communicating dis-"ease to domestic cattle. * * * This Court, "while sustaining the power of Congress to "regulate commerce among the States, has "steadily adhered to the principle that the "States possess, because they have never sur-"rendered, the power to protect the public "health, the public morals, and the public "safety, by any legislation, appropriate to "that end, which does not encroach upon "rights guaranteed by the national Constitu-

"tion, nor come in conflict with acts of Con-
"gress passed in pursuance of that instru-
"ment."

What rights guaranteed by the Constitution have been violated in these prosecutions? Not the right to own and enjoy property, for these drugs, while a species of property, by even the Federal Act, (the Harrison Act,) are to a certain extent "outlaw" and entitled to just such protection as is given them by law only but to that extent alone, and that protection further is given to only such persons as are in such law described and licensed; not these defendants.

A reference to a California case, in which this very question was involved, might not be considered inappropriate.

In re Yun Quong, 159 Cal. 508; 114 Pac. 835;

In that case the whole poison law now under consideration was discussed, and its relation to the fourteenth amendment to the Constitution of the United States protecting the right to the enjoyment of property, and also the question as to what power of the State was exercised in the passage of the Act, was fully considered. The Court said:

"Passing to the main point in the case, peti-
"tioner contends that opium is property, and
"that the act of the legislature making the
"the mere possession of it a crime is an in-
"fringement upon the rights of liberty and
"property, and that therefore the act is void.
"The constitutional right to hold and enjoy
"property is subject to such reasonable regu-

"lation as is necessary to conserve the public "health and morals and to promote the com- "mon good. * * * Opium is an active "poison, and while it has no beneficial use ex- "cept as a medicinal drug, its unrestricted use "would have a debasing effect on the moral "and economic welfare of a large portion of "our population. We are, therefore, of opin- "ion that its use, possession and sale may be "regulated by the legislature, and that the "act under consideration does not violate the "provisions of the fourteenth amendment to "the Federal Constitution touching the citi- "zen's right to the enjoyment of property. It "permits the use and possession of opium "under all proper circumstances while other- "wise prohibiting it. Hence we have no doubt "that the act is within the general *police power* "of the legislature and is valid. * * *

"So it may be said that the unrestricted use "of poisonous drugs would be the source of "ill-health, pauperism, misery and insanity, "the prevention of which must be numbered "among the objects of all enlightened govern- "ment. Most of our citizens have no desire "or occasion to use any of the prohibited nar- "cotics and the rights of those who need them "are amply protected by the terms of the act.

"The policy of the federal government on "this subject is in harmony with the policy "of this state, as is attested by the act of "Congress approved February 9, 1909 (35 "Stats. 614, U. S. Comp. Sts. Supp. 1909, p. "658) which prohibits the importation and use "of opium for other than medicinal purposes. "* * * Statistics show that the vice of "using opium is increasing in this country, "and it must be conceded that its indiscrimi- "nate use would have a very deleterious and "debasing effect upon our race, and in order "to prevent such a condition, and to make

"more effectual existing enactments, the legis-
"lature found it imperative to prohibit even
"the possession of the drug (with the excep-
"tions above noted)."

This precise question was passed upon to the same effect in

Ex parte Mon Luck, 29 Ore. 421; 44 Pac. 693;

Ah Lim v. Territory, 1 Wash. 156; 24 Pac. 588.

We have quoted at length from the California case at the risk of making this brief unduly lengthy, but it was with a view to showing the attitude of the Courts generally, and our own State Supreme Court in particular, toward this traffic, and to point out as clearly as possible the falsity of the reasoning of the Plaintiffs in Error that they are entitled to any protection whatever under the guise that they are to be protected in the commission of crime solely because of their contention (now shattered) that they were engaged in "commerce".

They are entitled to no protection in the face of the utterance of this Court in

Austin v. Tennessee, 179 U. S. 367; 45 L. ed. 233:

"One who plants his foot squarely upon the
"police laws of a state, and defies its officers
"to suppress or to punish his unlawful trade,
"must show a clear legal right to take and
"maintain his position as a public enemy, or
"suffer the penalty of the broken law. To hold
"otherwise would make it impossible for the

"people of any state to protect themselves
"from evils that by common consent * * *
"need to be restrained and removed by suit-
"able legislation. It would also strike a blow
"of absolutely crushing weight at the exist-
"ence of the police power in the several states,
"and render all attempts at its exercise inef-
"fectual and useless."

Under the facts in the case at bar, Plaintiffs in Error have not shown any right whatever to have these drugs in their possession in the State of California, and under the State Act and not coming under the Harrison Act, possession is wrongful. There is no inherent right on the part of any person to have these drugs in his possession, either for intrastate or interstate commerce, unless they are permitted to have them by the terms of one of the Acts. The drugs have been expressed as "outlaw" drugs, and their possessors are entitled only to such protection as the laws give them and no more.

It is our contention that all laws relating to drugs which contain provisions to the effect that they may be shipped, handled, possessed or owned refer only to their being shipped, handled, possessed or owned ONLY BY THOSE PERSONS ENTITLED TO HAVE THEM and not to all persons generally; in other words, that there being no inherent right to have these "outlaw" drugs in their possession, all drug laws, whether State or Federal, are, insofar as they relate to the right to ship, handle, possess or own them, grants of power to so do,

and not limitations of that power. To put it another way: unless the law specifically *permits* the shipping, handling, possessing or ownership of these drugs, they are prohibited.

It should never be held that Congress intends to supersede or suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. In the application of this principle of the supremacy of an Act of Congress, in a case where the state law is but the exercise of a reserved power, such as the police power, the repugnance or conflict should be direct and positive, so that the two acts cannot be reconciled or consistently stand together. In cases of this character, the remedy for unreasonable, harsh or oppressive regulations enacted by the states is to be found in the power of Congress to supersede state regulations by the enactment of others of its own. This has not been done, for as we have shown, the Harrison Act is a purely revenue act, and not an attempt to enforce the police power, which unquestionably has been reserved by the States. Unless the State law is in direct conflict with the Federal Constitution, or so unreasonable as to amount to an invasion of constitutional rights by roundabout means, the Federal Courts cannot take the initiative, until such time as Congress shall act. This principle has been held in the case of

Reid v. Colcrado, (supra)

Congress not having acted, this principle is applicable.

The mere fact that Congress, by the enactment of the Harrison Act, has, to a limited extent, dealt with the subject of drugs and narcotics, does not, of itself, show that the Harrison Act and the State Act conflict.

> "The same bale of goods * * * that "may be the subject of commercial regula- "tion, may also be the vehicle of disease. And "the health laws that require them to be "stopped and ventilated are no more intended "as regulations on commerce than the laws "which permit their importation are intended "to inoculate the community with disease. "Their DIFFERENT PURPOSES mark the distinc- "tion between the powers brought into action; "and while frankly exercised, they can pro- "duce no serious collision."
>
> *Gibbons v. Ogden*, 22 U. S. 235.

In the case heretofore cited

Missouri &c R. Co. v. Haber (supra)

this Court laid down the principle that the two Acts should, if possible, be reconciled, so that a statute of a state should, whenever possible, be upheld, especially when the objects sought to be attained, while similar, were to be arrived at from different sources of power.

> "May not the statutory provisions stand "without obstructing or embarrassing the "execution of the Act of Congress? It is "a settled rule that a statute enacted in exe- "cution of a RESERVED POWER OF THE STATE is "not to be regarded as inconsistent with an "Act of Congress passed in the exercise of a "clear power under the constitution, unless the "repugnance or conflict is so direct and posi- "tive that the two acts cannot be reconciled "or stand together."

This Court has never held that mere repugnance or conflict, standing alone, is sufficient to declare a state statute unconstitutional. This Court has always enunciated the doctrine that police regulations of a state must be sustained, even though affecting commerce or even in the case of exclusive jurisdiction in the Congress, provided Congress has not exercised its prerogative by legislating on the subject. The sole test, provided Congress has not acted, being, is the power in the State under the police or any other power?

> "A police regulation, even if it affects commerce, will be sustained by reason of the "ABSENCE OF CONGRESSIONAL LEGISLATION in respect thereto."
>
> *Gulf &c R. Co. v. Lewis*, 158 U. S. 103; 39 L. ed. 912.

> "Until Congress acts on the subject, the power of the State is plenary. * * * Where the subjects on which the power may be exercised are local in their nature or operation * * * the authority of the State may be exerted for their regulation and management until Congress interferes and supersedes it. * * * Inaction of Congress * * * is deemed a declaration that for the time being and until it sees fit to act, they may be regulated by State authority."
>
> *Escanaba v. Chicago*, 107 U. S. 678; 27 L. ed. 447.

The duty is not upon the People in this case to uphold the constitutionality of the State statute; it is taken to be valid unless the contrary is made

clearly to appear, and all intendments in favor of the validity of the statute are to be indulged in to uphold it. As was said by this Court in

Reid v. Colorado, 187 U. S. 149; 47 L. ed. 108:

> "The principle is universal that legislation, "whether by Congress or by a State, must be "taken to be valid unless the contrary is made "clearly to appear."

This Court has held far back, and has always held to the principles laid down, that mere conflict between the statute of a State and the Constitution is not sufficient to invalidate the law; that there must be either a conflict between the State statute and a law passed by Congress by virtue of the power conferred by the Constitution, or else the law as adopted by the State must have been so adopted *without any power whatever*, and in that case, of course, there being no basis whatever for the state statute, it must fall if in conflict with the Constitution. This was held by this Court in the so-called License Cases

5 How. 506; 12 L. ed. 504,

wherein this Court, besides holding that Congress has power to regulate commerce by appropriate legislation, but that if Congress has not exercised its prerogative, a law by the State is to be deemed and held valid, even though it may conflict with the Constitution and thus conflicts with the power of Congress to regulate commerce, said:

"The controlling and supreme power over
"commerce with foreign nations and the sev-
"eral states is undoubtedly conferred upon
"Congress. Yet * * * the State may,
"nevertheless, for the protection or conveni-
"ence of trade, or for the protection of the
"health of its citizens, make regulations of
"commerce for its own ports and harbors, or
"for its territory; and such regulations are
"valid unless they come in conflict with a *law*
"of Congess."

To the same effect see

N. Y. &c. R. Co. v. N. Y., 165 U. S. 628; 41 L. ed. 853.

A statute very similar, both in wording and effect, to the State Poison Act here under consideration, was construed by this Court in

Plumley v. Massachusetts, 155 U. S. 460; 39 L. ed. 223,

where the State of Massachusetts adopted a statute prohibiting the sale of oleomargarine in that State, except under certain conditions, such as color, weight and general condition. Plaintiff in Error in that case was convicted under the State Act for selling such a commodity as was prohibited, and upon the hearing it developed that the oleomargarine had been shipped by him to himself from Illinois. Plaintiff in Error thereupon claimed, as Plaintiffs in Error here have claimed, that the statute was in conflict with the Constitution, as an attempt on the part of the State to regulate commerce, and further claimed that Con-

gress had already legislated with respect to oleomargarine, and therefore the police power of the State to regulate its importation or sale, had been stopped by virtue of the fact that even though the State might have had the power to legislate, that right had been lost when Congress acted. This Court held that the Federal statute was purely one for taxation, and not an attempt upon the part of Congress to exercise any police power or regulate the sale of oleomargarine for any purpose other than taxation (which we claim was the effect of the Harrison Act). This Court in the case cited said:

> "This may be true so far as the purposes of "that Act are concerned. But there is no "ground to suppose that Congress intended in "that enactment to interfere with the exercise "by the States of any authority they could "rightfully exercise over the sale within their "respective territories of the article defined "as oleomargarine."

Furthermore, this Court held:

> "The taxes prescribed by that Act were im- "posed for national purposes, and their im- "position did not give authority for those who "paid them, to engage in the manufacture or "sale of oleomargarine in any state which law- "fully forbade such manufacture or sale, or "to disregard any regulations which a state "might lawfully prescribe in reference to that "article."

This latter case is on all fours with the case at bar, and we cannot see how they can be distinguished.

In order to finally determine whether or not the State Act is in conflict with the Constitution, it seems to us necessary that this Court determine under what power the Act was passed by the State Legislature. If it was a regulation passed under the police power, then the States have the right to adopt such laws to the exclusion of Congress, so that the other portions of the contention of Plaintiffs in Error (that the statute is in conflict with the powers of Congress) become immaterial, for even in that event, Congress is estopped, because of the reservation of this power by the several states, from even legislating on the subject at all.

> "We are of the opinion that the act is not "a regulation of commerce, but of police; "and that being thus considered, it was passed "in the exercise of a power which rightfully "belonged to the States. * * * If it be a "regulation not of commerce, but of police, "then it is not taken from the States."
>
> *Mayor of N. Y. v. Miln*, 11 Pet. (U. S.) 104; 9 L. ed. 132.

SUMMARY.

The facts admitted show the commission of the crime under the California Statute.

These facts are not only evident upon their face, as shown by the record, but have been determined by the verdict of the jury, and thus resolved against every contention of Plaintiffs in Error.

Plaintiffs in Error were not engaged in interstate or foreign commerce at the time of the possession, and therefore, even if the State act *is* in conflict with the Constitution as an attempt on the part of the State to regulate commerce (which we contend it is not) the Plaintiffs in Error cannot raise the constitutionality of this statute because they have not brought themselves within the class.

The shipment was not *in transitu*, its movement having been arrested and stopped by Plaintiffs in Error when they took possession from the carrier.

There is no conflict between the State Act and the Harrison Act, or any other Act of Congress.

The State act was adopted under a valid police power of the State of California.

There is no conflict between the State act and the Federal Constitution, as the line of demarkation stops when it has been determined that the act adopted by the State was adopted under the police power of the State, which has been reserved, and is always a power of the State to the exclusion of the Federal Government.

Finally, that even if all the contentions of Plaintiffs in Error shall be determined in their favor, the State Act must be upheld as a valid exercise of the police power of the State, for the reason that until Congress has acted, even a conflicting statute is valid.

CONCLUSION.

As a conclusion, we respectfully submit that the judgments and orders should be affirmed.

Dated, San Francisco,
April 8, 1918.

Respectfully submitted,

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